UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. ANN L. AIKEN, JUDGE PRESIDING

UNITED STATES OF AMERICA, Government, v. DARREN TODD THURSTON, Defendant.	No. 06-60069 06-60120
UNITED STATES OF AMERICA, Government, v. KEVIN TUBBS, Defendant.	No. 06-60070
UNITED STATES OF AMERICA, Government, v. KENDALL TANKERSLEY, Defendant.	No. 06-60071 ✓
UNITED STATES OF AMERICA, Government, v. STANISLAS GREGORY MEYERHOFF, Defendant.	No. 06-60078 06-60122

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UNITED STATES OF AMERICA,

Government,

v. No. 06-60079
06-60122

CHELSEA DAWN GERLACH,

Defendant.

UNITED STATES OF AMERICA,

Government,

v. No. 06-60080

SUZANNE SAVOIE,

Defendant.

UNITED STATES OF AMERICA,

Government,

v. No. 06-60123

NATHAN FRASER BLOCK,

Defendant.

UNITED STATES OF AMERICA,

Government,

v. No. 06-60124

DANIEL GERARD MCGOWAN,

Defendant.

UNITED STATES OF AMERICA,

Government,

v. No. 06-60125

JONATHAN CHRISTOPHER MARK PAUL,

Defendant.

UNITED STATES OF AMERICA,
Government,
v.) No. 06-60126
JOYANNA L. ZACHER,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

TUESDAY, MAY 15, 2007

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Kristi L. Anderson
Official Federal Reporter
United States Courthouse
405 East Eighth Avenue
Eugene, Oregon 97401
(541) 431-4112
Kristi_Anderson@ord.uscourts.gov

APPEARANCES OF COUNSEL:

FOR THE GOVERNMENT: UNITED STATES ATTORNEY
BY: KIRK ENGDALL, ESQ.
kirk.engdal@usdoj.gov
and JOHN RAY, ESQ.
john.ray@usdoj.gov
405 East Eighth Avenue
Eugene, Oregon 97401
(541)465-6771

FOR THE GOVERNMENT: UNITED STATES ATTORNEY
BY: STEPHEN PEIFER, ESQ.
1000 SW Third Avenue, Suite 600
Portland, Oregon 97204-2902
(503)727-1044
steve.peifer@usdoj.gov

FOR THE DEFENDANT THURSTON:
BY: DANIEL FEINER, ESQ.
1030 NW 12th, Unit 5
Portland, Oregon 97209
(503)228-2822
dan@danfeiner.com

FOR THE DEFENDANT TUBBS:
BY: MARC P. FRIEDMAN, ESQ.
245 West 13th Avenue
P.O. Box 11167
Eugene, Oregon 97440
(541)686-4890
mpfriedma@yahoo.com

FOR THE DEFENDANT TANKERSLEY:
HADDON, MORGAN, MUELLER, JORDAN,
MACKEY & FOREMAN, P.C.
BY: Lee D. Foreman, Esq.
150 E. 10th Avenue
Denver, CO 80203
(303) 831-7364
ldforeman@hmflaw.com

FOR THE DEFENDANT TANKERSLEY:
MCCREA PC
BY: SHAUN MCCREA, ESQ.
1147 High Street
Eugene, Oregon 97401
(541)485-1182
smcrea@callatg.com

FOR THE DEFENDANT MEYERHOFF:
LAW OFFICE OF TERRI WOOD
BY: TERRI WOOD, ESQ.
730 Van Buren Street
Eugene, Oregon 97402
(541)484-4171
twood@callatg.com

FOR THE DEFENDANT MEYERHOFF:
RICHARD L. FREDERICKS, P.C.
BY: RICHARD L. FREDERICKS, ESQ.
750 Lawrence, Suite 2
Eugene, Oregon 97401
(541)683-9240
rlfred@comcast.net

FOR THE DEFENDANT GERLACH:
FEDERAL PUBLIC DEFENDER
BY: CRAIG WEINERMAN, ESQ.
151 West Seventh Avenue, Suite 510
Eugene, Oregon 97401
(541)465-6937
craig_weinerman@fd.org

FOR THE DEFENDANT SAVOIE:
BY: JOHN J. KOLEGO, ESQ.
804 Pearl Street
Eugene, Oregon 97401
(541)484-1066
johnkolego@yahoo.com

FOR THE DEFENDANT BLOCK:
JOHN E. STORKEL, PC
BY: JOHN E. STORKEL, ESQ.
1415 Liberty Street, SE
Salem, Oregon 97302
(503)363-6625
oceanpoet@comcast.net

FOR THE DEFENDANT MCGOWAN:
SCHROETER GOLDMARK & BENDER
BY: AMANDA E. LEE, ESQ.
lee@sgb-law.com
and JEFFERY P. ROBINSON, ESQ.
robinson@sgb-law.com
500 Central Building
810 Third Avenue
Seattle, WA 98204
(206)622-8000

FOR THE DEFENDANT PAUL:
RANSON BLACKMAN, LLP
BY: MARC BLACKMAN, ESQ.
1001 SW Fifth Avenue, Suite 1400
Portland, Oregon 97204
(503)228-0487
marc@ransomblackman.com

FOR THE DEFENDANT ZACHER:
BY: WILLIAM R. SHARP, ESQ.
1342 High Street, 2nd floor
Eugene, Oregon 97401
(541)345-2002
sharp3223@comcast.net

I N D E X

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PROCEEDINGS

TUESDAY, MAY 15, 2007

THE COURT: Good morning. Please be seated.

THE CLERK: This is the time set for oral argument on the terrorism enhancement sentencing guideline in Criminal Cases 06-60069 through 06-60071, 06-60078 through 06-60080, 06-60120, 06-60122 through 06-60126.

THE COURT: Good morning. If I could ask each of the lawyers to introduce themselves for the record, I would appreciate it.

MR. PEIFER: Stephen Peifer for the United States.

MR. ENGDALL: Kirk Engdall for the United States.

MR. RAY: John Ray for the United States.

MR. SHARP: Bill Sharp for defendant Zacher.

MR. STORKEL: John Storkel for defendant Nathan Block.

MR. FEINER: Dan Feiner. I represent Darren Thurston.

MR. WEINERMAN: Craig Weinerman with Chelsea Gerlach, and Ms. Gerlach is present in the jury box.

MR. FRIEDMAN: Marc Friedman on behalf Kevin Tubbs. He's here.

MS. MCCREA: Shaun McCrea and Lee Foreman on behalf of Kendall Tankersley.

MS. WOOD: Terri Wood on behalf of Stan Meyerhoff.

MR. FREDERICKS: Rick Fredericks, cocounsel with Mr. Meyerhoff.

MR. KOLEGO: John Kolego on behalf of Ms. Suzanne Savoie.

MS. LEE: Amanda Lee on behalf of Daniel McGowan.

MR. ROBINSON: Jeff Robinson on behalf of Daniel McGowan.

MR. BLACKMAN: Marc Blackman on behalf of Jonathan Paul.

THE COURT: Counsel, I thank you very much for your extensive briefing. I think we have covered and read absolutely everything that's been filed.

Is there anything we need to take up before we begin argument at this time? Any other outstanding issues?

On behalf of the government, you are going to argue, Mr. Peifer?

MR. PFEIFER: May I use the podium, Your Honor?

THE COURT: You may use wherever you need to be.

MR. PEIFER: May it please the court, before dealing with legal arguments, I'd like to use my opening remarks to set the record straight on certain points.

The defendants have made both broad and specific claims that they don't deserve the terrorism enhancement and that they don't deserve the label "terrorist."

We should look first at the language of the information in the original indictment. It's the same in every defendant's case. Page 3 of each information sets out the manner and means of the conspiracy, and it says for each defendant, quote:

"The general purposes of the conspiracy were to influence and affect the conduct of government, commerce, private business, and others in the civilian population, by means of force, violence, sabotage, mass destruction, intimidation, and coercion, and, by similar means, to retaliate against the conduct of government, commerce, and private business. To achieve these purposes, the conspirators committed and attempted to commit acts dangerous to human life and property that constituted violations of the criminal laws of the United States and of individual states.

That is their conspiracy. That is their family. They can quibble over legal arguments, try to sanitize their conduct with noble motives, but that paragraph is what their family was all about.

Defendants' acts spanned five years, five western states, and were wholly intended to intimidate, coerce, frighten, punish, and demoralize people, not buildings. People. People in government, people in business, people in

private and public life. Directed at people, not buildings, for the purpose of changing or paying for, in the sense of retaliation, lawful public policy by government and lawful activity by business.

This is a classic case of terrorism, despite their proclamation of lofty humane goals. They attempt to soft-pedal their criminal conduct as somehow admirable because it was aimed at property, not people. They are wrong. It was aimed directly at people. It was aimed at people who research, as at the Oakridge Ranger Station; people who study, as at the University of Washington Horticultural Center; people who make and apply policy, government policy, at the U.S. Forest Service, Bureau of Land Management, Bonneville Power Administration.

Their acts were aimed at a variety of other people, people who construct, people who sell, people who serve the public, people who contract with the government, people who grow trees, people who operate the criminal justice system, people who provide jobs, people who support the local and regional economy, people who engage in national and international trade, people who actually work, people who support their families.

The defendants' conduct was aimed to punish people in government and civilian life for having the right to live lawful lives and to disagree with the defendants' radical

ideology. And defendants' conduct was aimed, by force, to frighten and coerce people in government and private life to change their lawful conduct, the essence of terrorism, and the dictionary definition of terrorism and the statutory definition of terrorism that we are operating under here.

And in every arson and every attempted arson, each defendant knew that there would be firefighters responding to the risk, responding to risk their lives to put out the fire and minimize the danger. The defendants knew that they created this danger to the firefighters or anyone else responding, but they did it anyway.

So it's totally disingenuous to claim that they cared for human life when the facts speak otherwise. For example, at Jefferson Poplar Farm, one of the destructive devices was placed right next to a large propane tank, a propane tank about twice as big as one of the tables here. At Childers Meat, one of the destructive devices was placed next to a natural gas meter and pipeline. At Romania Chevrolet, 35 Suburbans and Tahoes burst into flames. There will be videotapes of that fire for the court to see during the sentencing.

Fortunately, our infallible and prescient defendants didn't miss anyone who might have been inside a building. What they didn't know was that at Oakridge, frequently a forest service employee did spend the night at

that building at the ranger station, and, of course, they didn't check to make sure that no one was inside. It was pure luck that no one was killed or injured by their actions.

The defendants' argument is there was no injury to human beings, no danger to humans, and therefore, there was no terrorism. If that's the standard, the Ku Klux Klan did not commit terrorism when they traveled in the dark of night, three, four o'clock in the morning, burning black churches in Mississippi. No one was inside the churches, no one was there to be injured. They may not have wanted to injure anybody. They just burned buildings. So according to the defense theory, that's not a terroristic act.

If the same standard were applied today, then white supremacist organizations could burn synagogues and churches at night with nobody inside and it wouldn't be a terrorist act. If that's the standard, a group of tax protestors could make sure the IRS building is empty of all people, pay off the guards, make sure they weren't around, burn the building in the heart of the Washington, D.C., and it wouldn't be an act of terrorism. But that simply is not the standard for terrorism. It's not the law. It's not the general conception of terrorism.

The defendants say they aren't terrorists because they aren't Timothy McVeigh, they are not Ramzi Yousef, they

are not Terry Nichols, they are not Eric Rudolph. According to them, that's the standard of terrorism. That's like saying you are not an armed bank robber if you are not Willie Sutton or you are not Bonnie and Clyde. It's the gold standard. We haven't met the gold standard; therefore, they are not terrorists. Well, prisons are full of a lot of bank robbers who are not Bonnie and Clyde and they are not Willie Sutton, that's for sure.

The defendants make proportionality arguments, saying they don't deserve to be lumped with the big-name terrorists. What they failed to note is the other defendants who were serving terrorism-related sentences who had been found, who had received the enhancement for terrorism.

They compare themselves to the wrong people, frankly. They should be comparing themselves to Jack Dowell. He is in one of our cases we cite in the memorandum. Jack Dowell is serving a sentence of 30 years in prison for burning a building, one building, the IRS building in Colorado Springs, Colorado, a private building that was rented or leased by the IRS.

Judge Matsch sentenced Jack Dowell to 360 months in prison. Judge Matsch knows terrorism when he sees it. He was the Oklahoma City bombing judge. He sentenced Terry Nichols. He sentenced Timothy McVeigh after the jury

verdict.

Jack Dowell was acting as a lookout with his drinking buddies, frankly. They had been to the bar beforehand and decided to burn the building in Colorado Springs, members of the so-called Constitutional Law Group. Jack Dowell was the lookout. He stayed outside, same as many of these defendants. Just stayed outside as a lookout. They burned the building in Colorado Springs; then spray painted AAR, for Army of the American Republic, on the outside of the building, much as our defendants here painted ELF or ALF.

One arson. 30 years in prison for promoting a federal crime of terrorism, just as these defendants did. Serving as a lookout. No one was injured. Just property damage. That's who they should be comparing themselves with.

Then there's Travis James Harris. The *Harris* case is also cited. Mr. Harris was mad at the police in Monahans, Texas. Small town, obviously. Monahans, Texas had a municipal building where the police were housed. Mr. Harris threw a Molotov cocktail and burned the municipal building. Harris received 30 years in prison, one arson, because he promoted a federal crime of terrorism.

There's Imran Mandhai. We cite his case. He received 140 months for conspiracy to blow up power

transformers to retaliate against U.S. policy or U.S. support of Israel. The court said the terrorism enhancement applied there, even though it was a conspiracy. No property damage. No one injured. 140 months in prison.

Stephen John Jordi, we cite his case. He has a current release date of 2012. He was sentenced for attempted arson of an abortion clinic. No one injured. No property damage actually occurred. And the court specifically approved an upward departure for terrorism. Because the government was involved, the upward departure applied.

And while we are discussing proportionality, let's not forget the case of Rachelle "Shelley" Shannon, a case I prosecuted in the mid-1990s. Shelley Shannon is serving a 20-year sentence, 240 months, for six arsons and attempted arsons in Oregon, California, and Nevada. She wanted to save unborn babies. These defendants wanted to save animals and trees. The only person hurt in any of Shelley Shannon's arsons was a firefighter in Sacramento, and it was a minor injury. We sought the upward departure for terrorism in that case. Judge Redden avoided the issue, frankly, didn't decide it because he decided that he would still reach the maximum 20-year sentence using the extreme conduct departure instead. And she got the maximum sentence possible under the plea agreement of 20 years. That's who they should be

comparing themselves with.

Now, defendants raise the specter that anyone with a terrorism enhancement is automatically doomed to a dungeon, so to speak, at the U.S. penitentiary in Terre Haute, Indiana. It's a very emotional argument, but nothing more, because it's not supported by the facts. We live in the Twenty-first century, so we can find, in a matter of seconds, where these individuals are serving their sentences.

Jack Dowell, who burned the IRS building in Colorado Springs, is at FCI Jessup in Georgia. It's a medium security facility similar to FCI Sheridan.

Travis Harris, who burned the municipal building in Monahans, Texas, is at FCI Forrest City, Arkansas, a minimum -- excuse me -- a medium security facility. He's serving a 30-year sentence.

Stephen Jordi, who attempted to burn an abortion clinic, is at FCI Terre Haute, not the penitentiary, but at the FCI medium security facility.

Imran Mandhai is at the FCI Terre Haute, the FCI, not the USP.

Shelley Shannon is serving her 20-year sentence at FCI Dublin in California.

So it's simply not true that every terrorist serves sentences at USP Terre Haute.

Another point raised by the defendants is that it really doesn't make any difference to the government, since we can get the same recommended sentence, regardless of the enhancement, with the reduction for substantial assistance. Maybe. Maybe not. It depends on the individual defendant. But more important, it's the government's position here, as we advocate in every case, that there should be honest application of the sentencing guidelines. Truth in sentencing is the standard policy of the 1984 Sentencing Reform Act, and that's the policy we are asking the court to apply here.

The guidelines are now advisory, of course, but the sentence -- the system depends on honest application of them. And we can't hide the facts from the court, cannot ignore the application of those facts to the guidelines prior to final sentencing, regardless of what that final sentencing will be.

Can I get my water, Your Honor? I'm feeling a little dry.

THE COURT: Absolutely.

MR. PEIFER: Thank you.

Another point raised by the defendants is that there are two other defendants who are getting separate treatment, they say. Jennifer Kolar and Lacey Phillabaum. Both of them have pled guilty in the Western District of the

Washington and are facing sentencing there. Lacey Phillabaum did not commit a crime within the District of Oregon. Jennifer Kolar did. And her case involving the Cavel West fire has been transferred to the Western District of Washington where she's pleading guilty.

Her plea agreement states specifically that she is facing the terrorism enhancement. It's the same government written and negotiated plea agreement applicable to other defendants in that regard in this case. So Jennifer Kolar is facing that enhancement specifically.

Now, Lacey Phillabaum's plea agreement does not specifically refer to the terrorism guideline, but it doesn't provide that she won't receive it. It's an open sentencing issue, as are other guidelines issues, so Lacey Phillabaum more than likely will be facing the terrorism enhancement as well. She pled guilty in connection with the University of Washington fire.

So they are simply wrong when they say that these two defendants, Kolar and Phillabaum, are getting different treatment.

One last preliminary point, Your Honor, and that is the defendants make political arguments which we hope to avoid in this case. I think we have to respond to them here. I can say, and I think Mr. Engdall and Mr. Ray can say too, that it's been literally months, many months, since

we have had contact with anybody in the main justice department about this case. I have never spoken to anybody in the main justice department about whether or not to seek the terrorism enhancement, period.

This is an Oregon prosecution handled by the U.S. Attorney's Office for the District of Oregon. The investigation started in a previous administration in which the same terminology was applied to the same activities. Most of the crimes in this case occurred in the previous administration.

Mr. Engdall and I have been involved from the start, and we have characterized this the same way the FBI and other agencies have characterized it, as being an act of terrorism that started in 1996 with the Oakridge fire, in 1997 with the Cavel West fire. And we would be seeking the same enhancement if this case had been prosecuted under the previous administration. This is not a political prosecution.

Now, all of this preliminary discussion leads to consideration of the history, the interpretation, and the application of one guideline, § 3A1.4.

By specific agreement of all the defendants, the version in effect as of November the 1st, 2006 [sic], is applicable here, and that includes Mr. Thurston, who has a separate argument about that, why it would affect him, and

we deal with that in the memorandum why he's bound by the same agreement as all the other defendants.

Why is the history of this guideline important? Because it answers some of the defendants' complaints. Prior to 1995, and this was involved in the Shelley Shannon case, we had § 5K2.1, which was a policy statement -- 2.15, rather. A policy statement which existed since 1989. And it provided for a departure for terroristic action. Terroristic action wasn't defined. There were no limitations, foreign versus domestic, and no limitations to certain crimes. That changed in 1995, when § 3A1.4 was enacted. Then it became not a departure, it became an enhancement and was limited to international terrorism as defined in Title 18.

In 1996, after the Oklahoma City bombing case, congress and the sentencing commission, on the direction of congress, broadened international terrorism to encompass a new term, the federal crime of terrorism, which replaced international terrorism as the operative term. There's no requirement for crossing international borders in that provision. And the whole purpose of it was to broaden it to include domestic terrorism.

And that's, of course, contrary to the defense argument. Therefore, we have a whole series of cases that have involved purely domestic terrorism. The *Harris* case in

the Fifth Circuit involving a municipal building. The *Dowell* case in the Tenth Circuit involving the IRS building. The *Graham* case in the Sixth Circuit involving a host of domestic sites. The *Hale* case in the Seventh Circuit involving an attempt to kill a federal judge. No international connection. And in the *Terry Nichols* case, even though, because of the ex post facto clause, he wasn't eligible for the terrorism enhancement under the new provision, the Tenth Circuit said he would have been if that had been in effect when he took part in the Oklahoma City bombing.

The only case holding that § 3A1.4 may not apply to domestic crimes is the *Salim* case out of the Southern District of New York, a case that never went up on appeal because it was settled, and Mr. Salim is now serving his sentence at USP Florence, I believe, at the maximum security facility there.

That case never went up, and that's why there's no circuit case involving this. But we have the other circuits, Fifth, Tenth, Sixth and Seventh, all applying it, and the Tenth with Mr. Nichols would apply it to domestic terrorism, domestic crimes.

So the practice and the precedent from four circuits says that no international connection is necessary, and that, of course, is fully consistent with the history of

the provision.

The next question is what crimes qualify for the enhancement. The answer is simple. It's in the guideline manual. It says the crime must have either, A, involved, or, B, have intended to promote one of the numerous crimes listed in 18 U.S.C. Section -- and I will say this one time and I won't repeat it -- 2332b(g)(5)(B).

Now, that does not require actual commission of the listed crimes, just promotion of them, at the very least. Promotion of them. But in our case, we have actual commission of them, so it's not really an issue.

But we do have the applicability of the sentencing enhancement to § 371 conspiracies, which is important in this case because the conspiracy was broad and included the promotion of a number of crimes that are federal crimes of terrorism.

The applicability of the sentencing enhancement to conspiracies under § 371 is the precise holding of the Sixth Circuit in the *Graham* case, the Eleventh Circuit's case *Mandhai*, the *Arnaout* case, and the *Hale* case out of the Seventh Circuit. And there's no contrary case. I think that the law is overwhelming that 371 conspiracies do receive terrorism treatment if the conspiracy promoted a federal crime of terrorism.

Now, the other requirement, and this is the most

contentious one here, I'm sure, eventually, in the case of each individual defendant's sentence, is that the crime must be calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. And there will be much discussion about that under the individual crimes and defendants as we go through the argument.

Another question is what does the term government mean, because the government in the statute has a small "g." Doesn't have a capital "G," and it doesn't say U.S. in front of it. And the one case that has decided this issue, the *De Amaris* case out of the Southern District of Texas, gives a very excellent and a very full discussion of why government with a small "g" applies to more than the federal government. It applies to state, local, and even foreign governments.

If congress wants to make something applicable explicitly or expressly and exclusively to the federal government, it says "United States government." Gives some other indication that it applies to the federal government and not the states or local governments. And that's important in this case, because some of the crimes did involve an attempt to retaliate and coerce and intimidate not just the federal government, but state -- local governments, as well. As a result of that, the *Harris* case,

of course, applied to the municipal building and the *Graham* case applied to a number of nonfederal sites.

On the standard of proof, the defendants all say that we have the standard of clear and convincing evidence. They fail to note that no U.S. Supreme Court has ever said that in a sentencing guideline issue that clear and convincing is the standard.

The latest word from the Ninth Circuit is a case called *Pike* out of the District of Oregon, actually, that says the test is not just the disparity of the sentence when the enhancement is applied. It's a whole array of factors with disparity of the sentence or the increase in the sentence, the degree of it, as being just one factor.

Here, the court should look at the overall or final effect on these defendants as to what the standard should be, because after the downward departure for substantial assistance, after you have gone up for the terrorism enhancement and then down for substantial assistance, the discrepancy really is not that significant between what they could get and what they end up getting if the government's recommendation is followed.

Now, our position is that the proof will meet the clear and convincing evidence standard nonetheless in these cases, and as I go through them, I will explain how.

Other defense arguments are that the guidelines

should not apply to cases with only property damage. I mentioned this before, but now I'm going to discuss it specifically as it relates to the language of the statute and the guideline.

The defendants ask the court to apply, in every case, a proof that there was a substantial risk of serious bodily injury. The simple answer to that is that that's not what the statute says, and they acknowledge that the literal statute does not have anything in it about proving substantial risk of serious bodily injury. And as I pointed out, there are people serving very long sentences in prison in which there was no serious bodily injury, and this is -- this is the case, as well.

They are asking the court basically to legislate, to impose this standard, this requirement, when it's not in the statute. And their argument dwells only on the arson statutes under the different subsections of the two arson statutes, 844(f) for government buildings and 844(i) for private buildings.

What they ignore is the long list of crimes indicative of congressional intent, the long list of crimes that includes crimes that deal exclusively with property damage. This offense can be -- or excuse me -- the enhancement can apply if the crime promoted violation of § 1361, damaging government property. No requirement for

any serious bodily injury or risk of it. It can apply, and it did in this case, to violation of 1366, destruction of an energy facility. It can apply to § 32 of Title 18, destruction of aircraft. It can apply to § 1362, destruction of communication lines. And there are other examples. All property crimes with no requirement that there be a substantial risk of serious bodily injury.

And then there's a question, I think it was raised in Mr. McGowan's memorandum, it says that the Sixth Amendment jury right applies here because it would be a violation for the court to find the sentencing enhancement factors because it increases his sentencing -- his sentence.

Well, what that argument ignores is that after the *Booker* decision, the guidelines are advisory, and because they are advisory, there is no Sixth Amendment violation because the court can go inside or outside the guidelines up to the statutory maximum. We are certainly not asking the court to impose a sentence outside the statutory maximum. If that were the case, there would be a Sixth Amendment violation, but that's not being requested here and would not be applicable.

Before I go into the individual crimes and the individual defendants, Your Honor, I want to point out that there is an alternative argument that we are asking the court to consider if, in any individual case, the court

finds there's insufficient evidence for the sentencing enhancement for terrorism, and that alternative argument for the government is the upward departure for terrorism, which is allowed in any case, as in any departure, for circumstances outside the heartland of the typical cases this court sees.

This is not limited by the fact that the commentary changed after the agreed date. This is a departure argument which is -- clearly was available prior to that application note being added by the sentencing commission. So it's not an ex post facto issue since the court had the authority prior to the amendment, which simply recognized that authority.

And in this case, it would apply specifically to one -- one of the arsons, the one at the Childers Meat Company, since we are not contending that that involved any governmental motivation on the part of the defendants.

Now, going into the individual crimes and the individual defendants. The first fire that we are speaking of here was at the Oakridge Ranger Station in October 1996. There will be evidence presented at Mr. Tubbs's sentencing regarding that arson, a substantial amount of evidence that will show how it was a massive fire, destroyed a major government structure, a landmark in the community. And there will be testimony concerning what it destroyed.

People sometimes associate ranger stations with forest rangers, and that's true. The people who are involved in day-to-day activities in running the forest. But this particular ranger station, when it burned, it destroyed literally decades of valuable scientific research by forest service employees and others. It clearly was a violation of one of the listed statutes, § 844(f), and it -- as I said, it affects Mr. Tubbs here exclusively.

Now, that arson was motivated by years of animosity against the U.S. Forest Service over the Warner Creek timber sale. Mr. Tubbs was an active player, an active participant in that protest against the forest service. He lived at the Warner Creek site. There's a clear connection between him and the U.S. Forest Service, and it motivated this particular fire. And it was motivated to retaliate against the forest service and to influence or affect the forest service action in the future.

And as I noted, a forest service employee did periodically spend the night there, and the arsonists apparently didn't know that and certainly didn't try to find out about it.

Secondly, there is the government structures burned at the Burns BLM wild horse corral in 1997. This also involved, among these defendants, only Tubbs. That fire destroyed the government facility and therefore was an

applicable crime under 844(f).

Now, Mr. Tubbs wrote the communique in which he condemned the BLM for rounding up horses, auctioning them, sending them to slaughter. And the communique says, quote, This must be stopped, unquote. The communique specifically referred to a 1997 article, newspaper article that linked the BLM to horse slaughter.

There's overwhelming indication, Your Honor, based on that communique, what the motive was. The motive was to retaliate against the government for rounding up wild horses and sending them to slaughter by the very terms of that communique. And it was coercive in nature. By force, they were telling the government, stop doing this, don't do it, you will be punished. Directly comes under the sentencing enhancement for terrorism.

Now, related to that is a fire that actually occurred a few months earlier, the fire at Cavel West in Redmond, the horse slaughterhouse there. This affects Jonathan Paul; it affects Tubbs; and, even though she's not here, it affects Ms. Kolar, because we will be asking for the same enhancement in her case in the Western District of Washington.

Now, that fire completely destroyed a facility that was owned by a Belgian company providing horse meat to Europe. The BLM horses, there were BLM horses that were

bought by Cavel, or Cavel, much to the dismay of animal rights advocates and the defendants who took part in that arson.

This was brought to national attention in January of 1997 by a series of articles first published in the *LA Times*, and we'll introduce these at Mr. Paul's sentencing, in particular.

The articles didn't mince words about the fact that BLM was rounding up wild horses and selling them for slaughter. And anybody reading those articles would know the connection between Cavel West and BLM. It was specifically referred to more than once in the articles.

Now, I did a check through Westlaw of their database, *All News Plus*, going back to 1997, in that period. Those articles were picked up by virtually every major newspaper in the country. They were published across the entire United States.

As if that weren't enough, and to prove this connection, if the court looks at Page 13 of the Kevin Tubbs sentencing memorandum, Mr. Tubbs acknowledges that he researched Cavel West, and he chose that site as a target. And he refers specifically to an article in the Eugene *Register-Guard* where it says, quote, He learned this facility purchased wild horses that were rounded up from public lands, unquote. Now, that can only mean one thing.

That the connection is clear between the Cavel West site and BLM, a government agency.

Now, admittedly, the motive here was a mixed one, and just because you have a mixed motive -- and I'm sure all these defendants would say their motives were different at times, it doesn't make any difference, because one of the motives was to retaliate and continue to coerce a government agency. To retaliate against the slaughterhouse and to retaliate against BLM, a supplier of the horses. And this is a conspiracy case, so under the *Pinkerton* liability theory, the court can apply that motivation or purpose as a foreseeable factor and apply it to Mr. Paul and, if she were here, to Ms. Kolar.

And Mr. Paul cannot somehow withdraw his approval of an arson which was clearly directed at both private and governmental interests when it's so evident, from the record, that that was the motivation and the purpose behind it.

Then we have the Rock Springs BLM attempted arson, actually two attempted arsons, in October 1998. This affects Tubbs, Meyerhoff, and Gerlach. And, again, this is under a 371 conspiracy since they didn't plead to a substantive count for that fire.

But we have the same motivation as the BLM Burns arson, retaliation and future coercion of a government. The

communique makes that very clear. It reiterates the same motivation as at the Burns fire and the Cavel West fire.

And then we have, again, following in this order of the BLM fires, the Litchfield BLM fire in October 2001 that involved Meyerhoff, Thurston, and Tubbs, plus Ms. Kolar. And they promoted and they committed specifically a violation of 844(f). So it's one of the listed crimes.

And you go to the November 2000 version of the guidelines, and this is important to Mr. Thurston, at that time, the definition of the crime of terrorism under the statute did not separate out subsections of 844(f). It just says 844(f). So it applies to Subsection (1) and Subsection (2). Mr. Thurston pled guilty to Subsection (1), and it's subsumed within the entire statute 844(f) under the statutory definition and, therefore, under the guidelines.

Now, Mr. Thurston wrote the communique in that case, and the court has the text of that communique, and I won't reread it. But it, like the other BLM communiques, was directed directly against BLM, directly against the policies. It spoke about sending horses to slaughter. It was intended to retaliate against BLM and to attempt to prevent any future activity by BLM through force and coercion as a result of this -- of their own activity.

That leads us to the next government facility, and

that's the BPA high voltage transmission tower outside of Bend that Meyerhoff and Gerlach hit in November -- excuse me -- December of 1999.

Now, this is a completed crime, and that particular section, destruction of an energy facility, is listed under the definition of federal crimes of -- or crimes of terrorism.

And the government, of course, is a victim. The motive there was not vandalism. There's something in one of the memorandum about how, after it happened, law enforcement was stating that this appeared to be some random act of vandalism, or words to that effect. Well, there was no communique after that crime. There was no way of knowing at that time that that was linked to this group, the family, the ELF and ALF group. That came later when the case broke open during the investigation.

But clearly now we know, from the statements of Mr. Meyerhoff and Ms. Gerlach, that the motive was not vandalism. The motive was retaliation against government policy, an attempt, an attempt to coerce a change in that policy. Now, the intent here, and they researched this, was to shut down power as far as Los Angeles, because the line being the BPA power line, ends up in Los Angeles. And but for the fact that there were backup facilities available, it would have shut down power, but it didn't. But that was

their purpose, and that certainly was a motive against the government, the Bonneville Power Administration, in particular.

Then we come to the Vail ski resort. The Vail ski resort, of course, is not a government facility per se, but it wouldn't exist but for the fact that it's on government land, on forest service land. It's in a national forest, just the same as ski facilities in Oregon are in national forests at Mt. Hood, Mt. Ashland, and places like that. In order for those facilities to operate, they have to comply with strict requirements. They have contracts with the government, and they have strict permits with the government.

That particular arson at Vail came after many years of controversy, protests, and lawsuits over the construction of that -- of that ski area. The facility existed because of the government. If the government had not permitted that facility to be built, it wouldn't have been built. It could not have expanded without government permission. The motivation in this case was to retaliate against the facility, but the facility could not possibly even be there but for the fact that the government had permitted it. It had gone through a long series -- a number of years of litigation leading up to that construction.

Now, the communique in this case, the Vail case,

was written by Chelsea Gerlach, and it makes a future threat. It says essentially, don't expand any further or else. Now, that's directed, obviously, at Vail Associates, the corporation, but Vail Associates can't expand without government permission, more government contracts, more government permits. I'm sure that the defendants thought, at the time, they were just motivated by their concern about the lynx, the cats. But that may have been their primary motivating factor, just as horses were the primary motivating factor at BLM facilities and at Cavel.

But you have to look at all the circumstances, and they were very upset, obviously, that that facility had been built and might be expanded in the future, and the only way it could expand would be, as it had in the past, with government involvement. It indicates multiple motives.

It's comparable to a civil rights case in which you may have a defendant who was motivated by racial animus but, at the same time, hates, say, a black person as an individual. Well, that doesn't mean there's not a civil rights violation just because he has personal hatred towards that person, for some reason, as long as there's also the racial motivation.

So you can have multiple motives, and it doesn't cancel out the real motive here, the motive that is applicable to the terrorism aspect of it. The two are

intertwined, with a single motive to punish and stop the development at Vail.

Then there is the West University Eugene Police Department Substation, which was hit by an attempted arson in September of 2000. That involves Meyerhoff, Tubbs, and Gerlach. It's an attempt, but 844(i) has an attempt provision, and so they have pled guilty to violation of 844(i), one of the listed crimes under the terrorism statute.

And it is -- it was and is a government structure, as in the *Harris* case. The *Harris* case involved a municipal building that housed the police. Here we have a municipal building that housed the Eugene Police Department. And it was directed against the government, obviously. It's a government building.

Here, the motive was twofold. The evidence coming from the statements by the defendants, that evidence is that this was an experiment. They were developing some new devices that they would use later. They kept ratcheting up the technical aspect of their destructive devices, and they were experimenting with it at the EPD station.

But it was also a reward to local activists and to punish the police because there had been resistance to the police during the so-called Seven Week of Revolt. So it was a retaliatory action, pure and simple, against the Eugene

Police Department, a governmental entity.

Then there are three other cases involved forest products or timber companies. U.S. Forest Industries, that involves Ms. Tankersley and Tubbs. There is the Boise Cascade case. That involves Meyerhoff and Gerlach. And the Superior Lumber case, involving Meyerhoff, Tubbs, Savoie, and McGowan.

Now, all three of these companies were and are well known for cutting timber. That's their business. All three had substantial contracts with the U.S. Forest Service and with BLM for timber sales. And this is not an evidentiary hearing, but if it were, and at the actual sentencing we will be putting on evidence from the individual victim companies to explain to the court what that means and the degree to which they were involved in cutting government timber. And the controversy at that time, of course, as it continues now, is over cutting old growth timber. These companies did that by virtue of their own private contracts with private landholders, as well as with the government.

So the communiques speak generically about the company's environmental actions, but the court has to look at the full picture here to discern the overall motive. And as I said, that will be developed at the individual sentencings.

Then we come to the fire, the arson, huge arson at Romania Chevrolet in March of 2001. And this involves Meyerhoff, Tubbs, Block, and Zacher. This was an incredibly dangerous fire. It involved 35 SUVs, and the court will see a video of that fire actually taking place, hear the audio, hear the firefighters discussing it, and see the magnitude of it. Now, it clearly fits within the terrorism statute for two reasons. First, it's a violation of 844(i), so it's one of the listed crimes. And it has the required motive. Now, in this case, it's a mixed motive, apparently. They had this perverted idea that burning 35 Suburbans and Tahoes would help the environment.

But most of the communique discusses the other governmental motive, because it's an overt, antigovernment crime because of that. The communique makes clear the crime was retaliation, and it was retaliatory in nature and was really an extortionate act against the local government, especially the Lane County Circuit Court, where the trial of Mr. Luers and Marshall was taking place. It was directed against the state explicitly. It says that in the communique, against the state, in the form of the local court. It might as well have said Judge Velure. He was the trial judge. Everybody knew it at the time. It may as well have said lane County Circuit Court. Everybody knew that's where the trial was taking place. And it may as well have

mentioned the Lane County District Attorney's Office prosecuting the case. Instead, it mentioned in general but in nonetheless explicit enough terms that it was in retaliation for that case.

After that was what is known as the double whammy. The double whammy is a term used by the family members to describe what they did on the same night at the Jefferson Poplar farm in Clatskanie and at the University of Washington Horticultural Center in Seattle. It's a double whammy because it occurred at the same night. It was designed to occur simultaneously, and the defendants knew that, knew that there were going to be two actions at once, two fires, two arsons at once, a private institution at Jefferson Poplar Farm and a government institution at the University of Washington. Both of them were hit because the defendants had this convoluted view that they could further their objective by destroying property that was involved in what they thought was genetic research or genetic engineering.

Now, in the case of Jefferson Poplar Farm, they were wrong. Jefferson Poplar Farm had changed hands between the time they first surveilled the location and when the fire actually occurred. When the fire actually occurred, Jefferson Poplar Farm was not engaged in genetic engineering of any kind. It was involved in standard hybrid farming,

the same kind of hybrid farming that's gone on for centuries that probably originated when Gregor Mendel discovered genetics several hundred years ago. Did not involve genetic engineering.

Now, the genetic engineering that we are talking about, of course, did occur, the research occurred at the University of Washington, a state institution, a government institution, and that's what motivated that particular fire, as well.

Now, both of these actions were -- what they would call actions, these fires, these arsons, these crimes were both planned at the same location. The defendants went to Olympia, and they planned and prepared for the crimes there, carefully coordinated between the two. And that's evident in the communiques that resulted. And by their own admission, McGowan and Gerlach wrote the communique regarding Jefferson Poplar Farm. But when you look at the communiques, they are listed an Part 1 and Part 2, Part 1 being the University of Washington, Part 2 being the Jefferson Poplar Farm. So they cross-reference each other, and the retaliation and the warning for future action is the same in both. It's a cross-reference to each other.

But they made an additional statement in there, in the communique, directed against state governments of Oregon and Washington and pending legislation, quote, criminalizing

direct action in defense of the wild, unquote.

Now, whether in retaliation -- whether you view that as a retaliatory act that Oregon and Washington were considering to do that, to legislate, and only state governments legislate, or a warning for future retaliation for state legislation, this clearly links the Jefferson Poplar Farm to state governments, plural, both Oregon and Washington, by the very terms of that communique.

Finally, Your Honor, I wanted to refer to the Childers Meat Company. As we indicated, that's not connected to government action or government -- retaliation against government. It involves Meyerhoff, Tubbs, and Gerlach. It's still a terroristic act, still a crime of terrorism under the departure grounds. It was designed and motivated to retaliate against and to coerce a private business by force and, therefore, falls within what you might call a catchall provision for the upward departure.

And one final note, Your Honor. I have gone through these. I have stated them specifically in the sentencing memorandum. If the court has any questions, I'd be glad to answer them. The important thing, ultimately, for application of the guidelines is that each defendant does not have to be found part of a conspiracy to engage in a crime of terrorism for each individual fire. All it takes is one. For example, if one defendant involved in, say,

Romania, and the court finds the Romania Chevrolet fire was a crime of terrorism, which we say clearly was by virtue of what the communique says, then it's not necessary that that defendant be found to have committed a federal crime of terrorism for another fire. In other words, if the guidelines go up, they go up with one crime.

And that's clear in the cases that I have cited. All it takes is one crime. The mere fact that they may have committed a multiplicity of them doesn't increase the guidelines sentence substantially when it comes to the terrorism enhancement, which applies with one fire. It -- other factors may increase it, but the terrorism guideline goes up because of an individual fire, not because there were multiple fires.

If the court has any questions, I'd be glad to answer them.

Thank you.

THE COURT: No. I'm fine.

I'm assuming that you have structured the argument on behalf of the defendants. If not, do you want to take a minute to decide, or do you want to tell me the order?

MR. FRIEDMAN: I think, Your Honor, we have, and, if I may, what we were intending to do is provide a very brief overview, and then I think we have got an order established for counsel.

MR. WEINERMAN: Judge, if I may suggest, since it may be helpful for counsel at some point before we begin to revisit where we are going, it may just be helpful for us to have a break at some point to discuss --

THE COURT: I'd just as soon take it now if you need to organize how you wish to present. That might make some sense, as opposed to breaking in the middle. Do you want to do that?

MR. WEINERMAN: I think a break would be good at this time.

THE COURT: Let's take a ten-minute break.

THE CLERK: Court is in recess for ten minutes.

(Recess.)

THE COURT: Thank you. I have an order of presentation, but I understand we have sort of a technical defect, so does that change our order?

MR. FRIEDMAN: It does change it slightly. Rather than Ms. Wood coming in after Mr. Weinerman, what we'll simply do is move Mr. Sharp up, and Ms. Wood will present after lunch. So I guess, depending upon where we are, I understand that we are going to go until one o'clock, so depending upon where we are, we'll just sort of change that order slightly.

THE COURT: All right.

MR. FRIEDMAN: Your Honor, I just want to provide

the court with a brief overview. Obviously, there are many, many attorneys here representing multiple defendants in this case. It is our understanding that these proceedings today were not intended as an evidentiary hearing, and therefore, we are not going to -- other than perhaps making some reference with regard to the specific incidents and specifically to our individual clients, we are going to address the law in this case. But before we do that, I think what the court has to understand and what counsel will be addressing in this case is this is a political case. There has been a political element that was introduced in this case very early on, and whatever the government may say, it's something that the court needs to be aware of as part of this, specifically with regard to the application of the enhancement under 3A1.4.

The other thing that this court needs to consider and needs to consider at this point in time is how this enhancement will impact these defendants. As the court well knows, BOP makes its own decisions, relying upon the presentence report, certainly relying upon the recommendations of the court. But the impact of the classification as a terrorist within the BOP system is something that is substantial and quite, quite dire, and counsel will be addressing that at length.

Furthermore, Your Honor, with regard to these

cases, it is critical that the court understand that this case is unique. One, it is a case of first impression within this circuit; obviously, a case of first impression here before this court in this district.

And it's critical to understand that perhaps because of the political nature, just because of the nature of the enhancement, this case does fall -- appears to fall outside the range, and there is disparate treatment that's been applied.

Furthermore, Your Honor, it is critical that this court understand how this enhancement -- how we get to where the government is claiming, the problems with that, the fact that the law, it does not follow from the law, and that specifically with regard to the multiple specific offenses that are part of this case, whether or not they actually apply.

And what we are talking about here is 18 U.S.C. 371, the conspiracy count; 18 U.S.C. 844(f)(1), which is the destruction of government property; 18 U.S.C. 844(i), which is the destruction of property in interstate commerce; and then 18 U.S.C. 1366, the power lines. Each one of those represent a specific set of circumstances and a specific set of conditions as to whether or not the enhancement applies.

And we will submit, Your Honor, that there's argument that the enhancement does not apply to any of those

because those are not crimes of terrorism, because, as the argument will go -- move forward in this case, a critical element of that, and as, I think, counsel's alluded to, is the motive. And, again, it has to be calculated to influence or affect conduct of government by intimidation or coercion, or to retaliate against government conduct. And we submit that is not the case in any of these instances among any of these defendants. And the notion that counsel has put forward of some sort of mixed motive in this case is just wrong, flat-out wrong, and that will be addressed.

The other part of this, in terms of addressing this, and this deals, in part, with the way the statute that we are dealing with today is written -- and just a point of notice here, Your Honor. We are dealing with the sentencing guidelines from November 2000. I think counsel may have misstated that in his opening remarks. It is November 2000.

But specifically, the question is whether or not there was serious bodily injury. And what you are going to hear, Your Honor, this afternoon is not only the history of the statute as it has evolved, but specifically what the congressional intent was and the direction that was given to the sentencing guidelines commission in applying this. It appears that counsel has conceded this point that the applicable standard to be applied in this case is clear and convincing evidence. We ask the court to consider that and

ultimately consider whether or not, after everything has been said and done, whether the government has been able to reach that standard.

The other piece of this, in terms of the elements of the case, we submit, Your Honor, that has to be considered is whether the crimes in this case, under the enhancement that we are dealing with today, is whether or not the issue of transcending national boundaries. In other words, whether these acts transcended national boundaries.

Your Honor, there are multiple other issues that are going to be presented to the court. I mean, certainly not all defendants in this case are exactly in the same spot. Some of them came into this -- these -- were involved in acts early on and withdrew. Some were involved in acts that occurred much later on, not knowing about them. And that's something that individual counsel I know will be addressing in this case.

Overall, Your Honor, it is so important that the court understand that these are not the type of defendants, these are not the types of individuals that this terrorism enhancement was originally intended to address. And I -- I -- on behalf of Mr. Tubbs, and I know on behalf of other counsel, you are going to hear far more of this sort of the argument. But these are not your typical criminals. These people are not terrorists in any way, shape, or sense.

The other thing I would simply add, in reviewing the government's memorandum in this case, it appears that what they have done is used information that was derived from the debriefings of these individual defendants against them. I mean, it certainly is apparent in the memorandum. And we'll submit that under 1B1.8, that sort of evidence is inadmissible. And, again, I would anticipate that individual counsel will bring that up and perhaps file motions with regard to that.

Ultimately, Your Honor, we will submit that these -- this case, these cases, these defendants are not within the heartland of the terrorism enhancement statute. That these are not individuals who need to be locked away from society with lengthy sentences and under dire conditions. These are people that did commit some crimes, serious crimes with substantial property damage, but that's what it is. These are arsons, Your Honor.

I believe that the first attorney that will be addressing the court will be counsel Amanda Lee.

MS. LEE: Good morning.

THE COURT: Good morning.

MS. LEE: Thank you, Your Honor.

Your Honor, in a line of cases beginning in the year 2000 with *Apprendi* and culminating in 2005 with *Booker* and *Fanfan*, the Supreme Court restored both judicial

discretion and the protections of the Sixth Amendment for defendants in sentencing. I believe that what they did was restore both honesty and integrity to the sentencing process. And today, as a result, we all recognize that the guidelines are no longer mandatory but are merely one factor among several that the court will consider when imposing a sentence.

But the guideline calculation that this court will perform still carries significant weight, or we wouldn't be here today. Not every issue was resolved by the *Booker* case. When the court said in *Booker* that it would solve the problem imposed by the guidelines, the mandatory nature of the guidelines by severing out that provision of the statutory scheme that made them mandatory, the court did not solve every problem that was presented by the guidelines scheme. There were still problems that remained. The court recognized that in the decision, and the courts have been wrestling, in the aftermath, with various components of the guidelines. We have seen decisions about supervised release guidelines. We have seen decisions about other provisions of the guidelines since then. And I believe that 3A1.4 poses one of those problems that is unresolved.

The terrorism enhancement requires that the court set the criminal history category at level VI. And this involves fact-finding not done by a jury. And the teaching

of the Ninth Circuit in the *Kortgaard* case is that you can't just give a defendant five extra criminal history category levels for no particular reason.

When congress set up the guideline commission, it told the commission to craft guidelines for offenders based on two things. One was offense behavior categories. That would be the offense level side of the sentencing grid that we have now. And the other was called offense characteristic -- I'm sorry -- offender characteristic categories. And that's what gave rise to the criminal history category columns on the table.

Congress specifically said that what the court must have at the end of the guideline calculation process to compare with all the other 3553(a) factors is a guideline range that applies to the specific category of offenses committed by that specific category of offenders.

What the terrorism enhancement does is eliminate one half of this process by comparing the category -- where you compare the category of the crime to the criminal history of the offender.

The part where the court should examine the actual criminal history of the defendant has been eliminated, and it has been replaced by the arbitrary value imposed, not by congress, but by the commission. And it was chosen by the commission without any specific direction by congress to

accomplish a particular objective.

In addition to functionally overriding part of the sentencing process, the enhancement necessarily entails nonjury fact-finding that's prohibited after *Booker* and *Fanfan*.

And what happens is this, Your Honor, and it's happened in numerous cases: A court applies the Level VI enhancement part, goes up to Criminal History Category VI, and then recognizes that that's too high for the defendant. So then the court departs downward to a criminal history category that the court believes more accurately reflects what the defendant should have. And that criminal history category could be either, what I would call the true criminal history category that's based on the actual criminal history of the defendant, or a criminal history category that's the actual criminal history category plus a little bit more to account for something like the likelihood that that defendant will reoffend or the particular seriousness of the offenses at issue.

And this is precisely what the court did, for example, in the *Meskini* case in the Second Circuit. And what they said was the guidelines contemplate this process of bumping up to Level VI and then moving back down, a very result oriented process.

It was done recently again in New York in the

Hossain case just in March of this year. In that case, the court departed up to VI under 3A1.4 and went all the way back down to a level I, which was the defendant's true criminal history category. *Booker* forbids this process for the same reason that *Booker* prohibits upward departures based on facts not found by the jury or not admitted by the defendant other than prior criminal convictions. Starting at a level VI and working your way down to a particular result is functionally identical to starting at a level I and working your way up to the level that reflects what the court believes is the defendant's best estimate of true criminal history category.

The defendant's criminal history category is supposed to be based on his actual criminal history based on only those additional facts, such as likelihood of risk or seriousness of the offense that can be determined either by a jury or by the defendant's admissions. This is exactly what the Ninth Circuit said the court cannot do, itself, after *Booker*.

And we are not talking about a small increase in the numbers, as we noted in our brief. The increase from a level I to a level VI roughly quadruples the sentencing range that a defendant is exposed to.

Now, what happened with the terrorism enhancement, Your Honor, is in stark contrast to other sentencing

guidelines that incorporate very large leaps in the criminal history category. There are two of these in Chapter 4 of the guidelines, and that's the chapter that deals specifically with criminal history. Those two are the adjustments for armed career criminals and for career offenders. In both of those situations, there was a specific congressional mandate to jack up the sentences of the offenders to a very, very high level. And in both of those situations, it was not feasible to make that adjustment on the offense level side of the grid, because the focus was on the repetitive nature of the crimes the defendants were committing or the use of weapons repeatedly in different types of crimes. So the commission correctly focused on adjusting the criminal history category, and they did it pursuant to a congressional mandate.

None of that is true in this case. There's no mandate from congress to jack up the offender's scores, and in fact, the more relevant congressional mandate is the one that the terrorism enhancement actually requires this court to ignore. And that's the mandate in 3553(a) that asks the court to look at the defendant's true personal history, his true -- his or her true personal criminal history. If what the court does is move the criminal history up to a Level VI and compute the guidelines range, the court will come up with a guideline range that is so high, it will dwarf the

other factors that are built into § 3553(a). It's like -- the numbers just absolutely eclipse, in an astounding way, all the other factors, making that balancing effectively a meaningless process. That is not what congress intended.

Because the terrorism enhancement works in this way to eliminate the court's ability to meaningfully evaluate the defendant's true criminal history in the statutory scheme and because it contemplates fact-finding outside that that would ordinarily be done by the jury or be based on the admissions of the defendant, it violates the rules set forth in *Booker* and *Fanfan*, it violates the Sixth Amendment, and it is inconsistent with what *Booker* did in returning integrity and honesty to the sentencing scheme. I don't think that this can be remedied by simply ignoring the Level VI adjustment part of the -- of the -- of 3A1.4. I think the entire guideline is unconstitutional as it's written.

THE COURT: But I have to ask you, counsel, in having handed up your own plea agreement, doesn't your plea agreement waive this argument?

MS. LEE: I don't believe it does, Your Honor. Under our plea agreement, if you agree that the guideline is constitutional, we have waived -- we have waived fact-finding. You may find facts in order to impose the terrorism enhancement if you agree with the government that

the guideline is constitutional.

This is a facial challenge to the guideline. We did not waive any legal argument about the -- about whether the guideline is -- is constitutional and lawfully imposed on anyone. That's my reading of the plea agreement. We intended to preserve level arguments about the terrorism guideline, and this is a legal argument.

My argument is it can't be applied to anyone. If you believe that it can be applied, then what we have waived is the right to have jury findings of fact.

THE COURT: That's what I would --

MS. LEE: Yes.

THE COURT: For certain, that is how I read your plea agreement, but I also didn't -- I didn't see it as your ability to argue that as a legal argument per se. I see that as a waiver of your fact-finding right altogether, and if you waive that as for a jury trial for the liability phase of this trial, it appears to me in this waiver you have also waived that fact-finding ability for the sentencing obligation of this court, and that's specifically in Paragraph 5 of the plea agreement on Page 2, resolution of sentencing issues.

MS. LEE: There is Paragraph 5 about resolution of sentencing issues, and then there's a different paragraph specifically about the terrorism enhancement that says that

everyone is reserving argument on the terrorism enhancement. And you may disagree with me, Your Honor, but our intention was to preserve any facial challenges to the terrorism enhancement that we may have. And that's why we thought we were here today.

THE COURT: So your argument is, then, really, to the constitutionality of that enhancement, period.

MS. LEE: Purely to the constitutionality.

THE COURT: And applicability is -- in many respects is waived.

MS. LEE: Yes. So if the court rules that the guideline passes constitutional muster, we have waived the right to have a jury find any fact, and we agree that you may find the facts.

THE COURT: Right.

MS. LEE: We are perfectly comfortable having this court find the facts. Our argument is that a guideline that contemplates this type of fact-finding --

THE COURT: On its face.

MS. LEE: -- on its face is unconstitutional.

THE COURT: Okay. I just wanted to make sure I had it right. Thank you.

MS. LEE: Your Honor, to the extent that in our view the guidelines themselves represent a form of overreaching, I want to turn to a different kind of

overreaching now, and it's the kind of overreaching that I felt like I was hearing this morning during the government's argument. It's the kind of overreaching that would lead the government to argue that some things are automatic about them. And I guess what I want to say, Your Honor, to the government is it's not about you. The guidelines that apply to this case, as you have just heard a moment ago, are those that were in effect in November 1 of 2000.

And the terrorism enhancement, you will hear several arguments related to under what circumstances the terrorism enhancement could apply. I want to focus on that part that relates to governmental -- the governmental conduct link.

So the language is that the terrorism enhancement would apply in addition to the crime being one that is listed in 2332b(g)(5) and also if the crime is, quote, calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

The government argued extensively this morning about how the crimes at issue in this case were focused on people. We heard a lot about how they were focused on people, and that made them terrorism. The guideline focuses on crimes that are focused on the conduct of government, not focused on people. It's very clear that it's focused on

government in this case.

And I heard the government talk about how, under our reasoning, the crimes of the Ku Klux Klan would not be construed as terrorism, and while I was not planning to argue this point, Your Honor, it's not in our brief, it wasn't in my prepared remarks, I cannot sit idly by and hear what these defendants did be compared to the acts of the Ku Klux Klan and hear the government talk about the Ku Klux Klan burning empty churches. It is historically inaccurate, it is a gross and unfair understatement, and it is an insult to the African-Americans of this country and of the south in particular. Four girls in a Birmingham church, Medgar Evers on his front porch, three civil rights workers who disappeared, these are but some of the murders committed by the Ku Klux Klan during the civil rights era. This is not to mention any of the other murders, linchings, countless injuries committed by the Ku Klux Klan. The fact that not every incident resulted in an injury or a death to a black person in the south doesn't change one iota the fundamental nature of what the KKK was about. And to try to put the KKK on all fours with the defendants in this case is appalling.

By the plain language of the statute, arsons of privately owned businesses operating in interstate commerce would generally be expected to be outside the scope of the enhancement. By the plain language of the statute. It's

only in those highly unusual cases where the government can show by clear and convincing evidence that, although the target was nongovernmental, the motivation was somehow to influence or affect governmental conduct, or to retaliate against the government. That's a very high standard of proof, Your Honor, and it would be a very unlikely set of facts, and it is not what happened here.

Because I represent Daniel McGowan, I'm going to focus in particular on Superior Lumber and Jefferson Poplar, but I believe these arguments apply to other incidents as well, and I believe you will hear more from some other lawyers.

The government suggests in its brief that it can meet this test by little more than supposition. The government states, for example, that if a business does business with the government, then the court may infer that that was the basis, that that was the reason for the -- for the arson that occurred. And that the motive was to influence or affect the government or to retaliate against the government. That that's all you need.

But there's absolutely no evidence to support the assertion that Superior Lumber, for example, was targeted because it was engaged in logging on public lands. In fact, the communique describes Superior Lumber as, and I'm quoting, just a typical earth raper, indicating that it was

but one of many timber companies engaged in logging on both public and private lands that these activists hoped to stop. There's not a word in the communique about harvesting from public lands, about government contracts, about anything related to the government at all.

The logic of the government's argument is that if the conduct of the intended victim, the intended victim of a 2332b listed crime can in any measure be attributed to the government, and if the defendant could have known that, whether or not the defendant did know that, then the motivational element has been established.

Well, Your Honor, I think the ramifications of this reasoning are astounding and unwise. You can compare it, for example, to farmers in the agricultural industry. You could imagine the disgruntled operator of a small farm operation next door to a large farmer engaged in corporate farming. If the small farm operator decides to murder his neighbor, is he to be prosecuted as a terrorist? Under the government's reasoning, that prosecution as a terrorist would be justified because the corporate farmer gets federal subsidies.

There's a word for this, Your Honor, and it's overreaching. It's stretching. It's attempting to force the concept of terrorism to fit a set of facts and a group of people that it does not fit.

One thing the government said earlier this morning is that, I'm sure the defendants thought they were motivated by, and he ended that sentence, in that case, talking about the Vail incident with a phrase about the lynx. He said, I'm sure they thought they were motivated by that, as though in fact they were motivated by something else that they weren't entirely aware of.

And then he attributed to them a mixed motive. He referred to it as a mixed motive, this thing that the defendants were not aware of. The problem is that the other part of the mixed motive he was talking about was something that he was making up. There's no evidence to support it.

Jefferson Poplar Farms was also a privately owned corporation. As the government's noted in its brief, the defendants believed it was a different privately owned corporation when they committed the arson, but they never thought that it was a government-run operation, and it's not a government entity.

Now, the government also argued that the same motivations underlie both Jefferson Poplar and the University of Washington arson that occurred the same night. Well, not only is there no basis to assume that the same motivations drove all of these individual people, there's no evidence that each person had precisely the same motivations, and they cannot be presumed to have the same

motivations. And there's no *Pinkerton* liability for an individual motivation for purposes of the guideline.

There's another critical flaw in the government's reasoning. The government has argued, without any basis in fact, that the University of Washington qualifies as a government for purposes of the guideline enhancement. This is a dramatic departure from anything in the reported cases. Being a publicly funded institution of education does not render an entity a government.

The university is quite separate from the state government of Washington. The Washington Revised Code sets forth a charter that establishes a board of regions that governs the University of Washington. The university occupies lands that have been deeded to it. It has independent authority to purchase property, to sell property, to receive property by gift. University employees are hired and fired by the university, not by the state. They are paid by the university, not by the state. They are insured by policies purchased by the university, not by the state. And the state cannot be held liable for the acts of university employees or for acts that occur on university property.

So while the university may have some form of government, it is not a government. It is not the state government.

The government also asks this court to read into the communique motivations that are simply not in evidence about the Jefferson Poplar incident. The government argues that the reference to pending legislation in Washington and Oregon, about how this legislation will not stop the defendants' chosen intent to retaliate against the government. And in fact, it shows exactly the opposite, Your Honor.

The communique says, in essence, we know that this is illegal and we will do it anyway. That's a communication about the law, Your Honor. That's a communication that says the law is irrelevant to us and the law will not deter us. Let's be clear about this. The defendants who targeted Jefferson Poplar believed the experimental tree farming was harmful. Whether they were correct or not about that belief, that's what they believed. And their intention was to stop it, whether the government supported them or not.

They weren't getting back at the government by burning a tree farm, and the communique cannot rationally be read to suggest that. They were intending to stop the tree farm.

The government also argued that if the communique did not show actual retaliatory intent, it showed a link between the action and the government.

Your Honor, a link is not what the statute

requires. A link is not the test. The test is very clear in its requirement of -- of the intent to influence or affect the actual conduct of government through intimidation or coercion, or to retaliate against the government. A link, a supposed or positive link between an arson and the government is just not sufficient.

Your Honor, as I think you know, in some ways this isn't really about the numbers. It's not really about the months or the years that these defendants will serve. The government's sentencing recommendations are not going to change as a result of your ruling. I'm not suggesting for a moment that your sentencing decisions might not change. But I am saying that I believe the government's recommendations will not change, and I believe, as a result of our plea agreement, that our sentencing recommendations are unlikely to change as a result of your ruling.

That doesn't mean that your ruling on this issue is not profoundly important to all of the defendants in this case. It's about who these defendants are. It's about what the concept of terrorism means in these troubled times, about whether we still know the difference between, yes, people we have mentioned in our briefs, Osama bin Laden, Timothy McVeigh, and the people sitting in this room who adhered firmly to a credo of not killing and injuring people.

And if it hasn't been made abundantly clear to you in the reams of briefing you have received, I want to reemphasize it to you now in person, face to face, with my client in the room, that regardless of what sentence you impose on Mr. McGowan, we implore you today, and we will implore you at sentencing on June 4th, if you have not decided before then, to issue findings and to issue a statement, reasons in support of your judgment, that state strongly that the terrorism enhancement does not apply. That he is not a terrorist.

Your Honor, you have heard before in this case, and I think you will hear more today in greater detail, that the credo of the people who committed these crimes was one of not doing harm to people. They did intend to destroy buildings by fire. They did intend to harm real property. They did intend conflagrations by fire and to make a point, and they did do that.

They did also plan carefully to try to ensure that no one would get hurt. That no one would be there when the fires were set. And no people were there. And I say that not to justify the crimes, not to excuse the crimes, not to make Mr. McGowan look -- look better than he may look to you at any -- at any point, but when you impose sentence on Mr. McGowan and these other defendants, I hope you will be open to the argument, to the view, that these defendants are

not dramatically different from a defendant who burns a house out of vengeance toward a separated spouse or not dramatically different from a man who burns a business in order to collect on insurance policies, not dramatically different from those kinds of people who commit arsons for reasons of their own that may be base reasons.

The determination that someone is a terrorist is and should be one that involves the most careful scrutiny of things like the long-term likelihood of risk that he will commit future crimes, the person's current family life, the person's work history and what kind of work the person's doing now, the person's, you know, community ties and what he or she is doing in the community now, his or her actual violent nature and whether he or she represents the kind of danger to the entire community that sets him so far outside the range of offenders that he warrants this lifelong label.

And I say this not only because I personally believe it to be true, but because the Bureau of Prisons' practices are bearing it out. The creation of special management units where offenders who are classified as terrorists are all but cut off from the outside world tells us something about how severely the department of justice seeks to punish these offenders. One hour of phone time a month at Terre Haute, Indiana. One hour. That's 12 hours in a year. Four hours of visiting time in a month, and all

of it through the glass wall. All visiting live monitored. Never a private moment with your family or your friends or the people who should be there to support you when you get out.

Now, the government says that people who have been sentenced as terrorists are not all at Terre Haute or at Florence. And certainly that's true. Terre Haute just opened in December of last year. The wing isn't full. And I'm not here to argue that every single defendant in this room would be assigned to Terre Haute. My point is that any one of these defendants, or all of them, could be assigned to Terre Haute and there wouldn't be a thing that anyone in this room could do about it, or they could be assigned to different special management units with the same kinds of conditions imposed on them or worse. That's my point. This is what the department of justice is doing in punishing people that it classifies as terrorists based on the terrorism enhancement being imposed on them.

Your Honor, I -- I have enormous respect for the men at that table, but I could not disagree with them more about the issue of whether these defendants are terrorists. When Mr. McGowan is sentenced, we will present to you letters from his friends and extended community who lived and worked in New York City at the time of the World Trade Center attack on September 11th. And they will tell you in

their own words that they too disagree with the notion that fires in buildings that are empty could be described as terrorism, given the abiding intention of each of these defendants never to kill, never to injure people, only to destroy property.

I don't doubt that the men at the other table are sincere in their request for the terrorism enhancement, but their action with respect to Jacob Ferguson speaks volumes about what they see as the actual risk that these men and women pose to society.

Are the people of Eugene, Oregon, are they to believe that these ten individuals are dangerous terrorists who pose a grave risk to this community, while one of them, Jacob Ferguson, who is responsible for more than a dozen arsons, is not?

Mr. Ferguson made a deal with the government to cooperate with them, to assist them in their investigation, to avoid the punishment that the other defendants in this room will face. But it is simply not believable that the government would have made that deal with him if they thought he was a dangerous terrorist who needed to be removed from the community. I don't think they think that. I don't think they will stand here and tell you that they think that.

But what they are unable to admit is that the same

thing is true of these other defendants in this room. They are unable to admit that the same thing is true of Daniel McGowan.

I'm not saying that Daniel McGowan hasn't earned punishment for the crimes he committed. He has. Let me be clear about that. But what I am saying is that the plainest evidence that the government knows that these defendants pose no continuing risk to this community, that they are not terrorists who shouldn't be on the street, is that Jacob Ferguson is a free man.

And I got to tell you, Your Honor, I'm a human being, like everyone else in this room. I believe that people deserve punishment for their crimes, and I pray that my government is not making the kind of deals with real terrorists that it made with Jacob Ferguson.

Further, Your Honor, I believe the court is absolutely entitled to examine the process of applying the terrorism enhancement in the larger context of this era. I am not aware, in fact, of cases, in the years prior to the attacks of September 11th, in which the government sought the terrorism enhancement for property destruction alone in the absence of additional factors strongly suggesting that the defendant harbored intentions to harm or kill people, such as federal officials.

The government cited cases such as *Dowell* and

Harris. In *Dowell*, the tax protestor case, there was evidence in the record that the defendants were actually planning to kill IRS officials. In the *Harris* case, the defendant had, in the days prior, made two threats to kill police officers.

So while these are property destruction cases, there was clear evidence that the defendants had actual motivations that were established clearly in the record to harm or kill people. In the past few years, the rate of seeking the enhancement has escalated, however, to the point where the Bureau of Prisons has opened this new facility for lower risk terrorists in Terre Haute. I got to tell you, this concept alone would have boggled our minds a few years ago, and it still boggles my mind. It is one thing to say we need a special facility in Florence, Colorado, a supermax facility for the most dangerous terrorists we know of, but now we need a facility for low-risk terrorists.

I believe the term is an oxymoron. I don't know what a low-risk terrorist is, and yet now we have whole new facilities for them. You know, next we are going to have camps for terrorists.

But sadly, Your Honor, and all -- you know, my flip attitude about this aside, I think that this may end up mirroring, you know, in the long run, what we are seeing out of places like Guantanamo, where what we see in the long run

is that offenders who are released, after years under these conditions of confinement, are horribly damaged psychologically.

I understand that what awaits a low-risk terrorist in Terre Haute is nothing like what happens in Guantanamo. The conditions are not nearly so severe. But that doesn't mean that there aren't some reasonable comparisons. It's harmful in a way that goes way beyond what is necessary to cut an offender off from the outside community that way.

The research on this is broad, it's deep, it's lengthy. It goes back to the 1950s, and it all shows that depriving prisoners of meaningful contact with family and supportive friends has a tremendous negative effect on an inmate's adaptation to custody and his reentry upon release.

THE COURT: Counsel, for all of you, I just need to intervene at this point. I am -- having been on this bench nine years, I, more than others, know exactly what my recommendations to the Bureau of Prisons leads to. It leads generally to a letter saying they couldn't accommodate. It leads to the fact that I can't find a placement in the State of Oregon for female offenders. It leads to the fact that people accused and who have been convicted of immigration crimes go to the specified institutions. Just those two examples alone cut people off from their families and their support. That is the system we live in. I understand that

argument. I understand the research. You don't need to belabor it.

But I understand what my role is with regard to this argument, and those that you may raise are not helpful to me in making the decisions I need to make today. But I am painfully aware of, receiving the stacks of letters I have, where my recommendations are generally, across the board, not followed. The same with my colleagues, as we make these recommendations, hoping to put people in prison and in situations where, when they reenter the communities, and most of them do, they are in a better position to not offend and not commit additional crimes and create additional victims. But our recommendations generally fall on administrative deaf ears.

So proceed, but please don't take the time that I know is important for others to --

MS. LEE: I will -- I will -- I will drop the remainder of that point, Your Honor, and I guess all I will say is I appreciate your -- I appreciate your candor and your saying that for everyone's benefit. And all I would add, frankly, is that I believe that the terrorism enhancement has an effect all its own. And I realize that that's not a factor that should drive a court's consideration, but I don't think it's a factor that the court is required to ignore. That's my point. I don't

think it's a factor the court is required to ignore.

Your Honor, we depend on judges to sort through the natural and human desires for vengeance, for making examples of people, and for delivering retribution. We depend on judges to get through all of that and craft a punishment that fits the human being that violated the law, nothing less and nothing more.

This court's decision today, this court's statement of reasons in support of each and every judgment, may be the only thing that stands between Mr. McGowan and any of these defendants and these -- some of these special management units, you know, so we would be asking for recommendations against placement in special management units, the special communications units that particularly limit communication, that are designed to limit outside communication.

Your Honor, I want to close by -- by saying -- by saying a few words about -- as if I haven't already said a whole bunch about what I really think, I want to say a little bit more about what I really think about this, just as I believe the government has.

You know, every, every nation has its moments of shame in its history. And one of this country's darkest moments, I believe, has to be the internment of the Japanese-Americans during World War II. It was a time when

we had been attacked, we were at war, and we lived in a climate of fear. And it was so easy for the government to stretch and to overreach to say they might be spies, they might be terrorists, they might be traitors.

Japanese-Americans, at that time, turned to the courts, saying, we aren't any of those things, but the courts also turned their backs. And it wasn't until 1988 that the government apologized, saying that the actions were based on, and I quote, prejudice, war hysteria, and a failure of political leadership. And all of this was because we were afraid and because the government overreached in a time of fear.

Your Honor, I believe that people will look back on this era as well because we are at war, we are at war overseas, we are at war with terror, because we have been attacked and because we are afraid. And I ask myself, what will they see, Your Honor. I think they will see a government that has, again, stretched, a government that has overreached. Now there are terrorists everywhere overseas. There are terrorists everywhere among us. The person next to you may be a terrorist.

Now, there's an obvious difference between these defendants and the Japanese-Americans of World War II. Daniel McGowan committed a crime. The Japanese-Americans committed no crime at all. But just as the

Japanese-Americans were not traitors, were not spies, the people in this room are not terrorists.

We implore you, Your Honor, not to turn your back. We implore you to uphold the letter and the spirit of the law. We ask you to remind us all that in a world of true threats to our nation's security, in a world of real people who would slaughter innocents, we have never been terrorized by men and women who burn empty buildings.

We ask you to tell the government that the concept of terrorism cannot be stretched so far.

Thank you.

THE COURT: Mr. Weinerman.

MR. WEINERMAN: May it please the court, Judge, I'd like to talk a bit about the practical significance of what's happening here today and what the government is trying to do. We heard earlier that the government is engaged in a process, I think they used the term truth in sentencing. I would suggest that there's something else that's going on here.

In my view, whether the court imposes the terrorism enhancement will have little effect on the government's recommended sentencing for many, if not most, of the defendants in this case, because the government will be moving for a significant downward departure based on substantial assistance. Now, I don't think the court has

that information yet. My understanding is the government is going to be submitting letters to the court in that regard. So the court, as the court sits here today, doesn't know, other than looking at the plea agreement, you know, what the basis is.

So what is the effect of what's happening? Well, we know, of course, that the sentencing guidelines are advisory. The court is not bound by them. And the government is making recommendations, and the court obviously has the discretion to go below the government's recommendations, and every defendant will be asking the court to do that.

So because the guidelines are advisory and because the government is going to be making substantial assistance motions, whether or not the court imposes the terrorism enhancement is going to have very minimal effect on the ultimate sentence the court is likely to impose. If I could use my client, Chelsea Gerlach, as an example, and I think this is pretty consistent with probably most of the defendants, but I don't profess that I speak for every defendant in saying this.

But in Chelsea Gerlach's case, if the court does not impose the terrorism enhancement, she winds up with a total offense level of 26, her criminal history category is Roman Numeral I because she has no criminal history, and her

advisory guideline range is 63 no 78 months. That's without the terrorism enhancement.

If the court applies the terrorism enhancement, that results in a sixfold increase in her advisory guideline range. In other words, she winds up with a total offense level of 38. Her criminal history category, although she has no record, is the highest because 3A1.4 of the guidelines say treat everybody as if they have the worst criminal history category possible, so she's a VI rather than a I, and the guideline range is 360 months to life in prison. So that's a 12-offense level increase and a six criminal history category increase in her sentence if the court imposes the terrorism enhancement.

But after the government seeks this sixfold increase in the advisory guideline range, the government's going to immediately turn around, and I'm obviously not criticizing the government for doing this, but I think the court needs to know this to see what the practical effect is. The government immediately turns around and recommends an identical 12-level downward departure. So raise the offense level 12, go down 12. So we are back down to a level 26. The only difference is if the court imposes the enhancement, then the guideline range is 120 to 150 months because Ms. Gerlach is now a Criminal History VI rather than a Criminal History I. And the government recommends a

sentence of 120 months.

So the effect, at least under the plea agreement, is rather than a sixfold increase in the sentence, a doubling of the sentence, 63 to 78 versus 120 to 150 months.

And that is, of course, and we'll be making some of these arguments at sentencing, the issue out there, which I just want to plant in the court's mind, is whether anybody, if the court imposes this enhancement, whether any defendant who has a Criminal History Category I, if you place them in Criminal History Category VI, does that significantly overrepresent their criminal history, and does it overrepresent the likelihood that any of these defendants are going to reoffend.

But that's -- that's an issue that can be talked about at the individual sentences. And, again, and I don't mean to presume that the court will or should impose a terrorism enhancement. I'm just speaking now theoretically if the court does it, what is the effect.

So with that backdrop, with that background, the question becomes why are we doing this. Why are we engaging in this tortuous exercise. It seems we are all riding on a roller coaster. We are going up. We are going down. We are going sideways. We are going back. And we wind up in practically the same place. So why are we doing this?

The government, earlier today, said that this is

not about politics. They disclaim that there were any political motives. And, again, I would echo that I have dealt with all counsel representing the government, and I have nothing but respect for them as well. And I am not impugning any bad motives to them individually or as a group. But I have to say, and I'm not going -- because this has already been said far better than I can, to compare these defendants to the Ku Klux Klan, I think you are making this a political situation. I am glad to see that the government is refraining from comparing these defendants to al-Qaeda, but nonetheless, it's no better to be compared to the Ku Klux Klan.

So there are political considerations at work here. And the political considerations, in our view, are not coming from Eugene, Oregon, or coming from Portland, Oregon. They are coming from Washington, D.C. And when this case was indicted in January of 2006, the attorney general of the United States, Alberto Gonzales, held a press conference in Washington, D.C. and, as far as I know, for the first time described these acts as acts of the domestic terrorism. At the press conference, Mr. Gonzales used the term "domestic terrorism" to describe the offenses committed by the defendants in this case and used the term terrorists to describe these defendants individually.

And, again, to my knowledge, that's the first time

that label has ever been used in a similar situation; in other words, arsons, environmentally motivated arsons that resulted in property destruction and no harm to individuals, no physical harm to individuals, and the first time, to our knowledge, that has been used to describe these type of acts committed by Earth Liberation Front, Animal Liberation Front types of groups.

And so it seems to me that there are labels at work here. That there is this ever-expanding attempt to try to stretch this term, it's this loaded word, "terrorists," beyond common sense. You know, we are not talking about the gold standard here. We are talking about common sense, in our view, and we are saying that shouldn't we reserve the use of the term terrorists for the most egregious acts of violence designed to hurt people and not designed to hurt property? Because if we are going to label these defendants terrorists, then I think someone's going to have to invent a new word to describe what the KKK did in the past, what Timothy McVeigh did, what Eric Rudolph did, because it just doesn't fit when the purpose and the motive is to harm property and not to harm people.

The government said earlier that we are lucky that no one was hurt. And I think we can all agree on one thing. We are all glad no one was hurt. But in our view, that was not luck. That was design. Without justifying the arsons

that were committed in this case, no one was hurt by design. You know, Judge, there's an old saying, once is an accident, twice is a coincidence, three times is a pattern. It was no accident that in all of the acts that were committed, not only in this case, but in other ELF and ALF cases throughout the country, nobody was hurt, and that's not a coincidence either. It was a pattern. It was by design.

So that is what the court is dealing with, and that's the backdrop. Should we use this term "terrorist" to describe these individuals. That's kind of the general view.

Others are going to be arguing, you know, the nuances and specifics of the law. I just want to basically address a few issues.

The briefing and the government's contention is that there's really only two things the court looks at in determining whether a federal crime of terrorism has occurred which would justify the imposition of the terrorism enhancement, and that is was a predicate offense occurred, and I cannot deny that Chelsea Gerlach and others had been convicted of predicate offenses, like arson, like damaging an energy facility. I can't deny that.

And the other element that the government argues, the only other element that the government argues must be established is the motivational prong, whether the purpose,

the motive of the persons who committed the offenses was to retaliate against the government, coerce.

I would suggest to the court that there's more that the government has to prove, and I ask the court to look at this entire chapter, Chapter 113B. That's where these statutes are. It starts with 2331 and it goes up to 2340. And 2332b(g)(5), and I also hope to say that just once, is within that chapter, Chapter 113B. And it seems to me the court has to look at the entire chapter in deciding what a federal crime of terrorism is, not just that one particular section.

There's a section, 2331(5), which defines domestic terrorism. Now, I will say, I understand that that particular section was not -- did not become the law until October 26th, 2001, as part of the Patriot Act, so it was not -- it was not the law at the time the acts -- the arsons in this case were committed, but it seems to me that that definition, which, incidentally, involves acts dangerous to human life, that's the definition that congress gave to domestic terrorism in October 26th, 2001, it seems to me that that tells us what congress was thinking all along in 1996 when they decided that the terrorism enhancement should apply to acts of domestic terrorism.

That's what congress was thinking. That it has to involve an act dangerous to human life. It has to involve

an act -- if we are going to apply it to acts involving the targeting of real or personal property, then those acts have to be dangerous to human life. Saying it another way, they have to be acts that create a substantial risk of death or serious bodily injury to another person.

So it seems to me there's a third -- there's a third element that has to be established by the government by whatever the burden of proof is, clear and convincing, beyond a reasonable doubt, that has to be established before the court can find there's a federal crime of terrorism and before the court can impose the terrorism enhancement on any defendant in this case.

I want to just briefly address the government's argument in some of the individual cases, and I hope the court will allow me also to briefly talk about that at Chelsea Gerlach's individual sentencing, and that is if we get down to whether the court, the fact-finding the court has to make in determining whether, in these individual arsons, what the motivation of the individuals were. In other words, did they have the motivation to retaliate, coerce, intimidate, et cetera.

The government made lots of arguments. I'm going to leave some of the rebuttals to some of my cocounsel, but I would like to just talk about the argument that they made as it -- as it pertains to some of the arsons, particularly

the Vail arson, the Boise Cascade arson, and the JPF, Jefferson Poplar Farm arson. And it's this issue of the multiple motive and such.

It seems to me that the best evidence of motive, the motive that the court should look to, the evidence of the motive that the court should look to is what did the communique say. Those were written either shortly before or shortly after the arsons, and that tells us -- that's the best evidence of motive and purpose.

And if the court looks at the plain language of these communiques, and I will take Vail for example. You know, the government makes an argument that I would characterize as a heads-I-win/tails-you-lose argument. If the communique says that you are motivated to harm the government, if you chose the victim as a government entity or your motive was to harm the government, you say it in the communique, you -- or we, the government, win. But even if the communique says nothing about the government, you still lose because we are going to infer that your motive was to harm the government, although you said absolutely nothing about it.

So for example, the Vail arson that the government is saying indicates that there was a motive of the persons who committed that arson to retaliate, I ask the court to look at the communique and what it said. It clearly said it

was targeting a private entity, the Vail ski resort, not the government. Doesn't mention the government at all. It said that the arson was targeting the conduct of the ski resort for expanding its operation which intruded --

(Reporter interrupted.)

MR. WEINERMAN: The communique said the arson targeted the conduct of the Vail ski resort for expanding its operation and intruding upon the lynx habitat. It talked about -- it criticized a private entity. It said nothing about the government.

The fact that the government was involved in some approval process when the Vail ski resort decided that they wanted to expand their operations is not mentioned anywhere in the communique, and to my knowledge, no one has made any statement that would be admissible for the court to consider in deciding whether to impose the enhancement that would indicate that that was the motive.

So the government is never mentioned, and the government has just not proven by clear and convincing evidence that the Vail arson, for example, was committed with the motive or purpose to intimidate the government or to coerce the government.

Again, the same thing can be said for the Boise Cascade arson. I, again, urge the court to look carefully at the communique, and it criticizes the logging

practices of a private company. It says nothing about the government. The fact that Boise Cascade has contracts with the government and Boise Cascade logs on government, U.S. Forest Service land is really besides the point, because that has never been indicated by any of the defendants who committed those offenses to be their motive.

So I would ask the court, you know, not to accept -- Ms. Lee said it's an overreaching argument. I would say it's a bootstrapping argument. It's basically saying, if a private entity has any sort of relationship with the government, then we are going to presume that the intent of the persons who committed the offense, the arson, was to retaliate or to coerce the government. And it seems to me that is not overreaching, but --

THE COURT: Is Vail different because it is on forest property?

MR. WEINERMAN: I'm sorry?

THE COURT: Is Vail different than Boise Cascade because it is on entirely forest property? Can that be distinguished, or do you see it as a distinction?

MR. WEINERMAN: I don't see the distinction, Judge, because there's no proof that -- by clear and convincing or whatever burden of proof the court selects, that that would -- that they even knew that. You are presuming -- you know, a statement was made earlier today

that -- in a different context, I think the Cavel West, that there were all these newspaper articles which, you know, described the BLM's involvement and all. You know, we are making presumptions that people were aware in the Vail case of a lawsuit, were aware that the Vail ski resort is on forest service land.

You are making a presumption without any proof, and I don't see the distinction unless someone has made an admission or someone said in a communique, we did this not to -- not to try to change the behavior of a ski resort, we did this to change the behavior of the government. And I think that's a distinction that has to be made, and the government has just not established it.

THE COURT: And what I think that leads me to tell all of you is that these individual sentencings may be more intense because I'm not going to necessarily be able to make a ruling that defines, in each case, how this guideline is applied.

MR. WEINERMAN: Correct.

THE COURT: And after reading all the briefing, I came to that conclusion, and I'm even further convinced that's the case today. So you need to argue, if you have more to argue, or you need to just reserve the cases you intend to offer with further evidentiary issues so that I don't have to -- I can detail those in my opinion, and I

will, but if you want to give me a heads-up on which ones you know you are going to have to do, that would be helpful, as well, in your rebuttal.

MR. PEIFER: Each sentencing will involve evidence presented. For example, at Vail, we'll have the senior vice president explain the entire time line of what happened and how it's tied to the government.

THE COURT: And, again, I was concerned when I talked about doing this in an overarching --

MR. WEINERMAN: Sure.

THE COURT: -- manner and having the arguments. It's going to be extremely helpful, but it also may be inconclusive in how we address each sentencing. So I'm just raising those issues for down the road.

MR. WEINERMAN: Sure. And I find myself in kind of an unusual position, because by the time the court sentences Chelsea Gerlach, I believe a week from Friday, the court will have already decided this issue in the sentencing of Mr. Meyerhoff because the same issue is going to be raised. So I feel I had to --

THE COURT: No. That's fine.

MR. WEINERMAN: -- to say this today because, by the time I show up on Friday, either, you know, we have won the issue or we have lost the issue, and I don't think the court can or will make a distinction between the two. I

think that they are in a similar situation.

The last thing I just want to say, and, again, because the court is going to be hearing sentencings of Mr. Meyerhoff before Chelsea Gerlach, I just want to ask the court, when listening to what the evidence is of motive, for example, counsel, this morning, talked about what the motive was for the toppling of that transmission tower, BPA, and what the motive was for the attempted arson at the Eugene Police Substation. I would just - I guess I would like to preserve the record at this point and say that if the government -- and the government cited statements, I think, made by Mr. Meyerhoff in one or both of those, and I have some concerns that the government is using statements that were made during protected debriefings, and under the guidelines 1B1.8, the court cannot use those types of statements to increase a person's sentence under the guidelines. So I'd just alert the court to that issue on those -- those two.

So Judge, the court is going to be hearing from a lot of others, and I'm going to step aside. I would just, you know, say that the court has a very difficult decision because, you know, there's more to this -- there's more to this than just, you know, the practical effect on the individual defendants, if that is not bad enough. But there's a label here, a very loaded term that the court is

being asked to put on these individual defendants, and I would ask the court not to do it. To proceed with caution.

And in the end, I think when the court hears all the legal and factual arguments, the court should rule that the government has not met their burden of proving the terrorism enhancement and the label terrorist should apply to these defendants.

Thank you.

MR. SHARP: May it please the court, I would like to speak from here, if I may, so that I can use the overhead projector.

THE COURT: That's fine.

MR. SHARP: I'm going to mention only two topics and speak about only one. The topic I will just refer to and mention was my memorandum that dealt with the issue that congress did not intend, back in 1996, that all arsons be deemed a federal crime of terrorism, and I supplied the court with some legislative history about that particular situation having to do with the Oklahoma City bombing. That what congress was really worried about, when it was adopting that law, was government property and private property that was involved in the conduct of government, such as the day-care center that was privately owned but was serving government employees.

The topic I wish to address to the court today

is -- by the way, I would be happy to respond to questions regarding that memorandum or to respond to opposition, but as yet, there hasn't been any, so I feel like I fully covered that topic and don't intend to revisit it unless there's a question later.

What I would like to address is the issue that's been addressed by several attorneys and provide some history to it, and that is what is terrorism? Where have we come from and where are we going?

Mr. Weinerman, in his argument, stated that property damage only should not be considered terrorism and that none of these defendants belong in the same category as Timothy McVeigh or the September 11th terrorists, and I join in those arguments.

So I'd like to take a look at what did congress mean when, in 1995 and '96, when it passed the laws that amended 18 United States Code § 2332b.

I have read all of the house and senate judiciary committee minutes on this topic of terrorism in the years 1995 and 1996, and I have abstracted most of it in a few pages. And I have read all that I could find for the year 2001 when the law was changed.

My inquiry has been, what did congress intend to cover in 1995 and 1996 under the rubric of terrorism? What type of activity was it trying to have investigated and

stopped?

The tables that I put together summarize what was the threat that congress was addressing. On the video screen I will present the table showing the results of my legislative history research. I will ask the court's permission that I be allowed to file these tables later as a second appendix to my memorandum previously filed.

I'd like to go through each of the hearings, beginning with the hearing before the house committee on the judiciary, April 6th, June 12th and 13th, 1995.

THE CLERK: Turn it over.

MR. SHARP: Oh, I see. That's better.

Okay. And the only one -- I've listed the speakers on the left. And then I have abstracted what the speakers were concerned about, what either incident or threat they were concerned about. And so the main one I want to talk about on this page is Representative Henry Hyde, because Representative Hyde introduced House Resolution 1710, which later was merged with the Clinton Administration bill which amended 18 U.S.C. § 2332b.

Representative Hyde referred to the following incidents: The Pan Am Flight 103, the victims of strife in Northern Ireland, kidnapping and execution of Marine Colonel Higgins by Hezbollah in Lebanon, the first World Trade Center bombing in 1993, the gassing -- I have put poisoning

by a Japanese terrorist cult. That was the gassing of the Tokyo subway where several people killed. The murder of two American consulate officers in Karachi, Pakistan.

So -- and then the rest of the representatives who spoke before the other speakers at large spoke at the April 6th hearing essentially focused on the 1993 World Trade Center bombing where several people were killed and on Pan Am Flight 103 where a great number of people lost their life over Lockerby, Scotland.

Next, the acting director of the CIA spoke, and he first gave us some statistics about the number of international terrorism incidents, talked about the 1993 WTC bombing; bombing of the Jewish cultural center in Buenos Aires; gassing of the Tokyo subway; firebombings of Turkish targets by Kurdish separatists, which actually was resulting in the death of about one Turk every five minutes, according to the statistics later given.

And then Mr. Studeman concluded by stating, "The greatest terrorist threats to the United States today come from extremist religious groups, especially Islam. These include the Lebanese" -- excuse me -- "Lebanese Hezbollah, the Palestinian group Hamas, and the Algerian Armed Islamic group."

Then Jamie Gorelick, the administration's chief representative, who is an assistant attorney general --

(Reporter interrupted.)

MR. SHARP: Jamie Gorelick spoke who was -- I'm trying to get all this in before lunch, but I'll --

THE COURT: I'd rather have a court reporter this afternoon who can function.

MR. SHARP: Very well. I will slow down a little bit.

THE COURT: Please do.

MR. SHARP: Sure.

Jamie Gorelick spoke, and she referred to Pan Am Flight 103; assassination of two American consulate officials in Pakistan; the aircraft hijacking, such as TWA 841 [sic], which involved the murder of a soldier; 1993 WTC bombing; and plots to bomb federal office buildings, U.N., Lincoln Tunnel, and George Washington Bridge.

Louis Freeh -- which are all the major transportation facilities.

Louis Freeh, director of the FBI, referred to the Pan Am Flight 103, biological weapons, the Biological Weapons Anti-Terrorism Act of 1989, production of nerve gasses in the U.S. and Japan, threats to kill or injure nongovernmental officials and leaders of interest groups.

And Philip Wilcox, coordinator, counterterrorism of the department of state, he addressed the threats that were shown by Pan Am 103, taking hostages in Lebanon, murder

of Colonel Higgins in Lebanon, murder of the consulate officials in Pakistan, plot to bomb American airliners in Asia, 1993 WTC bombing, bombing of the Jewish Cultural Center in Buenos Aires, bombing of the Israeli embassy in Buenos Aires, and the Tokyo subway nerve gassing.

So -- and then that's about all I will mention on that page. But I think it should give the court the idea of the types of threats that congress was being concerned about.

Okay. So we move from April 6th, 1995, which was pre-Oklahoma City bombing, to June 12th, 1995, which was post-Oklahoma City bombing.

And then Representative Hyde introduced his bill, and he provided a definition of terrorism in his bill, and we can see that at least some of Representative Hyde's definition found its way into law. As I have indicated, Representative Hyde's bill was merged with the Clinton Administration's bill for a final product. But that's where we can see where some of the definition came from.

Then the speakers who addressed threats, as we can see, the different representatives, Bryant, Gekas, Skaggs, all primarily referred to Oklahoma City. Jamie Gorelick came back, the assistant AG, and spoke about -- the threat she focused was on a threat such -- like Oklahoma City.

Then the other speakers before the house

committee, I will just very briefly say they all spoke of threats involving people dying, and either actually people dying or attempts or plots to kill people. And there -- I added this other part here because this is about the only time where there's much discussion about what the definition of terrorism is in the speaking portions. There were a few written submissions later on in the senate judiciary committee where they talk a little bit about, well, should we have a broad or narrow definition of terrorism.

And, as the court can see, James Fleissner, who is a former assistant attorney general, argued that, "All of the crimes added in House Resolution 1710 could easily be involved in terrorist action. My simple view is that adding to the list of crimes, filling these gaps, is just a good idea."

And what I got from the context of that colloquy they were having was he's saying we need a broad definition so that we can really get the people who we are trying to get, which -- and the people who they are trying to get, as was very clear from what everybody in that hearing was saying, were the people who were killing other people. And that was the clear context of everything that was going on these days, and his argument was not to try to make everybody a terrorist, but to have a broad -- kind of a broad net so we can catch the people who really are

terrorists.

The final speakers, and this is by far the longest set of hearings, actually, was -- were the house hearings in April and June of 1995. These were all people, again, who -- they either spoke about explosives, controlling ammonium nitrate, taggants for explosives, or they talked about specific terrorism incidents where people were killed.

At about the same time, the senate judiciary committee was meeting, Senator Hatch spoke, and, I think tellingly, in his opening statement, and he -- the only danger that Senator Hatch referred to was the Oklahoma City event, and he said, "Of all the evils of our age, terrorism is one of the greatest. *The taking of innocent life in order to make a political statement, advance a cause, or coerce a government is utterly reprehensible.*" And the italics have been supplied by me.

Then Senator Specter, Biden, Kohl, Dole -- sorry. I'm probably going fast there -- Nickles, and Inhoffe all addressed Oklahoma City, and Specter and Biden addressed the WTC, the 1993 World Trade Center.

The next set of speakers appearing before the senate judiciary committee were, once again, Assistant Attorney General Gorelick. She again -- she spoke of Oklahoma City, Pan Am 103, 1993 WTC, the Tokyo subway gassing, manufacture of the nerve agent ricin in Minnesota,

and the murder of consulate employees in Pakistan, and then also nuclear devices.

Director -- FBI Director Freeh talked about specific incidents where people were killed, several, such as Pan Am 103, 275 [sic] people killed; Beirut Marine Barracks, 241 people were killed in that.

And then Mr. Freeh concluded by saying that, "The FBI cannot and should not, however, tolerate and ignore any individuals or groups who advocate violence which would kill innocent Americans and which would kill America's kids." That was on Page 27.

Robert Kupperman, Center For Strategic and International Studies spoke. He referred to Oklahoma City, 1993 World Trade Center and Tokyo subway gassing.

At this point, I will just do one other one for 2001. The reason I looked at 2001 was a little bit in connection with what I believe Mr. Weinerman -- it was Mr. Weinerman who stated. Sometimes it might be interesting to see what congress was saying in 2001 to see if it gives us any hint about what they meant in 1996. And I know the rules in looking at legislative history. What congress says later about what it meant is never as persuasive as what it said at the time that it was doing it. And so what we just saw was the statements in 1995-96 that are more persuasive.

In the senate judiciary committee, these speakers

spoke. Everybody else, actually, just gave written submissions. But Senators Leahy, Hatch, and Attorney General Ashcroft, Senator Thurmond, Senator Grassley all spoke about September 11th. Of course, it was September 25th, 2001.

So I have a few other, but I will -- with the court's permission, I will just submit by appendix. But that's -- I wanted to give the court a -- the -- the facts as far as what our congress was looking at, what it was concerned about, what type of a threat was it trying to address, what was it trying to investigate and stop.

So here are the conclusions from my legislative history research for the years 1995, 1996, which were the years when the operative definitions of terrorism were formulated. These are not gray areas. They are not uncertain. They are not disputable.

First, all persons who spoke to the house and senate judiciary committees on terrorism who cited specific historical incidents of terrorism referred only to incidents where people were actually killed.

The only exceptions to that are cases where somebody was trying to kill somebody else, such as the plot to assassinate president George H.W. Bush. There was some discussion of that. But other -- the only -- just the focus was on attempts to kill people or actually killing people.

Number two, all persons who spoke to the house and senate judiciary committees about future threats talked in terms of government employees or civilians dying, or they talked about guarding against attempts to kill government employees or civilians.

Number three, no person who testified argued that people who seek only to damage property should be deemed as terrorists. No member of congress expressed a desire that people who are only trying to damage property should face terrorism laws.

My conclusion, after the review of hundreds of pages of legislative history, research, and transcripts of hearings, is terrorism is about killing people. That is what our members of congress thought, and that is what the witnesses before the judiciary committee said. It is not a close call. It is simply not possible for anyone to read this history and come up with any other conclusion.

One final point of the legislative history that is ironic, instructive for us, perhaps, and even a little bit amusing. On October 3rd, 2001, a veteran policy expert Morton Halperin testified before the senate judiciary committee. Mr. Halperin testified that he wanted to comment on two administration proposals. The second administration proposal he commented on was this: He said, quote, I want to comment on the extraordinary proposal to include

disclosure of the names of covert agents in the new list of terrorism crimes. This is a speech crime that has no place on the list.

Mr. Halperin's position won the day, and the disclosure of covert agent names did not become a federal crime of terrorism. That was 2001.

In light of what took place two years later in the disclosure of the Valerie Plame -- Valerie Plame was a covert agent, one shudders to think of how many administration officials could have been prosecuted under the terrorism laws.

The administration officials have the liberalness of Mr. Halperin to thank when he, in essence, said, come on, that is not terrorism.

And Your Honor, that is the argument I am making to this court today. Similarly, what we are talking about in this case is not terrorism.

MR. STORKEL: Your Honor, would this be the appropriate time to take a lunch break or --

THE COURT: Does that work for everyone? I knew we were going to break at one o'clock. That gives -- you are up next, Ms. Wood, and that gives you a chance to get the computer set up?

MS. WOOD: Yes, Your Honor.

THE COURT: Okay. All right. We'll break then.

An hour? Take an hour? An hour?

MR. FEINER: Judge, will the courtroom be locked?

THE CLERK: Yes, it will.

THE COURT: The courtroom will be locked.

MR. FEINER: Okay. Thank you.

THE CLERK: Court is in recess for an hour.

(Recess.)

THE COURT: Thank you. Be seated.

MS. WOOD: Your Honor, Terri Wood for Mr. Meyerhoff. If it please the court, I will proceed.

Your Honor, I have one witness, Dr. Zelda Ziegler, who we'd like to present some brief evidence through that supports the arguments that were made in a section of the terrorism memorandum that deal with the legal issue about the substantial risk of injury or death, and they will be applicable to all the defendants in this case. So she's on the witness stand, if I could have her sworn in.

THE COURT: How long do you expect this to take?

MS. WOOD: Very -- as short as possible, Judge. I hope to be done in 30 minutes or less.

THE COURT: Okay.

THE CLERK: Ma'am, can I have you stand and raise your right hand.

(The witness was sworn.)

THE CLERK: Can I have you state your name for the

record, spelling both your first and last names.

THE WITNESS: My name is Zelda Ziegler. That's Z-E-L-D-A; Ziegler, Z-I-E-G-L-E-R.

MS. WOOD: Please be seated.

Your Honor, Dr. Ziegler has provided her curriculum vitae and the statistical analysis of fire safety risk, and I have given a copy to the court and to the government. So unless there's objection, she would testify briefly as an expert in the fields of statistics, chemistry, and physics regarding fires and explosions.

THE COURT: Counsel.

MR. ENGDALL: No objection, Your Honor.

THE COURT: Thank you. Proceed.

DIRECT EXAMINATION

BY MS. WOOD: 3

Q. Dr. Ziegler, you were one of Mr. Meyerhoff's instructors at Central Oregon Community College in Bend, correct?

A. Yes.

Q. And you have maintained contact with Mr. Meyerhoff after he left Bend, including after his arrest in this case, correct?

A. That's correct.

Q. You have also agreed to work as a defense expert on this case?

A. I have.
Q. We asked you to try to tell us, from applied mathematics, how likely it was that all of the arsons committed by the ELF and ALF over the course of its history, as tracked by the FBI, have never resulted in a single injury or death?
A. That's true. I was asked to do that.
Q. We also asked you to demonstrate some of the physical properties of the incendiary devices that were used by Mr. Meyerhoff and others in this group and, in particular, to show whether these devices were explosives or fire bombs.
A. I was asked to do that, as well.
Q. And we also asked you if you could tell us, based on scientific evidence, about the hazards of exposing propane tanks, outdoor propane tanks to fire?
A. I was asked to do that, as well.
Q. Have you charged for any of your expert services in this case?
A. I have not.
Q. Would you just tell the court briefly why you donated your services?
A. I donated my services because I have kept track of the case through the newspaper, and I have read the indictment, and I know Mr. Meyerhoff. And it's -- as a scientist, I have a strong belief that it's important to make decisions

based on data wherever possible and let your decisions be informed by that and less by emotion, and I wanted to make sure that that, as much as possible, was available in this case.

Q. Dr. Ziegler, I have provided you with Defense Exhibit 101, which is your curriculum vitae, and Defense Exhibit 102, which is the statistical study you did. What question did your study address?

A. The statistical study addressed the question of whether 1200 arsons would result in -- what the chances of 1200 arsons resulting in zero injuries and deaths would actually be.

Q. And you also reviewed Pages 28 through 29 of the memorandum in opposition to application of the terrorism enhancement that I filed on Mr. Meyerhoff's behalf that references some of the statistics from your report?

A. Yes, I reviewed that.

Q. And did the statistics that were set out in the memorandum, were they accurately stated from your report?

A. Yes.

Q. Does this report truly -- which -- I'm sorry. This report, which is Defense Exhibit 102, does it truly and accurately state the source of the data, the methodology you used, and the conclusions you reached in answering this question?

A. Yes, it does.
Q. And would you adopt your report as your testimony today?
A. I will.
MS. WOOD: Your Honor, we would offer Exhibits 101 and 102 into evidence.
MR. ENGDALL: No objection.
THE COURT: Be received.
BY MS. WOOD:
Q. Dr. Ziegler, we also asked you to try and help us understand how the incendiary devices used by Mr. Meyerhoff in this case function from a scientific standpoint, correct?
A. Yes.
Q. And we provided you with materials from discovery that included a manual about setting fires with electrical timers?
A. Yes.
Q. And after reviewing those materials, did you develop a demonstration to help explain how these devices worked?
A. Yes.
Q. I'm sorry.
A. Go ahead.
Q. Particularly to address our concern about whether these were explosive devices or firebombs.
A. Yes.

Q. Can you just tell us briefly what -- you made a video of that, correct?
A. I made a video of that.
Q. Okay. Can you just describe for us briefly what we are going to see in the video. How you came up with this as being an accurate miniature-type depiction of the types of devices used by this group.
A. I chose to make a video so I could -- it could be more portable and amendable into your new courtroom. I also scaled it down quite a bit, and I believe that -- and after I looked at the -- the scaled-up version that was performed by the Corvallis Fire Department, I could see that the assumptions were correct in choosing the smaller size of the demonstration.

Basically what we did, we took two small yogurt cups that were the same rough dimensions, the same proportionate dimensions as the five-gallon buckets used in the arsons. We used about 10 or 15 milliliters of the fuels listed in the documents that were provided to me, and we used an ignition source that was external to it. And then we videoed it as it -- after we ignited it as it burned to demonstrate exactly what it looks like when these things actually burn. And I think we have -- is it time for the video? We have --

Q. If you would go ahead and explain what we are seeing on

the screen.

A. Sure. You will see on the screen, as soon as he gets it loaded up, that there are two yogurt cups, and I'm putting -- on the left-hand side there is a mixture of diesel fuel and gasoline, and on the other side is a 100% gasoline, similar volumes, and off to the right-hand side of that gasoline cup is -- there are staged some live matches. They haven't been lit. So those are typically easy to ignite with a reasonable flame. They are easy -- so those are at various distances.

We had to turn the lights down so that we could see the contrast. And we started the cup on the -- the cup with the gasoline with a Bunsen flame. I think that's beginning to happen right there. You can see it takes quite a little bit of -- quite a bit of contact with a flame to get the vapor to ignite. And then it ignites.

And you will see right away that the focus gets really bad, mainly because the camera is trying to focus in on a flame. But the first thing that happens is the cup melts away. And the part you can't see is that the cup that still has liquid fuel in contact with it is -- it still maintains its integrity. So it's not a broad expanding pool so much as it is just a little contained pool. And you will notice that the cup with diesel fuel in it doesn't light on -- doesn't catch fire, even though there's a burning

ember right next to it.

And see that the matches are also not lit. There's no fireball. There's no mushroom cloud. In fact, in my -- in my experience with flames, a yellow flame is pretty cool. You can put your hand in there. The fact that it's smoky indicates to me that it's an oxygen-poor flame, a fuel-rich flame.

I think we are going to skip to -- skip to a piece in the video in a second where we actually demonstrate that those matches are live because we start another match by sticking it directly in the flame above it.

Four minutes later. It's -- it's notoriously boring, unfortunately. We called it the yule log for a while. It was -- so we take a match, and I light the other matches to indicate that they are real matches. And they are just a little further away, and none of them lit.

And the diesel fuel mixture, we couldn't get any action out of lighting the pure diesel fuel with a match, so we had to -- this is the thing that ELF also noticed, that they couldn't get -- they couldn't get 100% diesel fuel to light, so they had to mix it at least 50/50 with gasoline, and that's one of the things it says in the manual.

You will see that we had put the match deeply into the cup with the diesel fuel in it to get it to start. It burns in a very similar fashion. And it goes on for several

more minutes before I finally extinguish the flame by inverting a beaker over it to reduce the source of oxygen to it.

Q. Now, Dr. Ziegler, it's actually the -- the vapors that are on fire, not the liquid?

A. Right. The liquid actually cools the cup and keeps it from melting, and everything happens in the gas phase. And that's one reason why the flame goes up and down is because it's slowly -- it slowly depletes the oxygen in one region, and it takes a little while for it to diffuse in.

Q. And your understanding, from reading the discovery materials, is that the decision by this group was made to mix diesel with gasoline to cause the flame to burn slower and longer?

A. That's my understanding, yes, and I would corroborate that.

Q. By that process, succeed in catching something on fire?

A. Right.

Q. And you also reviewed a video that was done by the Corvallis Fire Department that we obtained through discovery?

A. I did.

Q. And we are going to show just a short segment of that, because you believe that corroborates the validity of your experiment in terms of how this functioned?

A. That's true. I will point out the observations that -- that support my opinions. And they actually show constructing a device as well, and unfortunately, they are not using a funnel, so there tends to be a lot more gasoline spilled on the outside of it. As soon as he gets -- yeah. He spilled some gasoline there, which is going to increase the surface area and promote more evaporation.

I don't know if they are adding -- it looks like gasoline to me. I can't tell. And then he douses the sponge. That's part of the igniter. And they have a remote lighting step. There's a spark. And you can see that the -- the sponge wick with the gasoline on it lights first. It takes a little while for it to take off. You see the same yellow flame. You see the same smoke. You might see a little bit different behavior of the plastic jug because it has the gasoline on the outside and not on the inside.

And you will see that the majority of the liquid inside the gallon jug is not doing anything. The reaction is definitely at the interface between the liquid and the vapor, and if any of it is spilled, it tends to make it go worse, a little faster.

But again, there's no fireball. There's no -- there's no dramatic explosion of anything.

Q. Dr. Ziegler, is it your understanding, from reviewing the materials, that a one-gallon jug would often be used as

a fuel source to have flames that would ignite the liquid in the five-gallon buckets?

A. I believe that's the intent of the design. And then they go through and extinguish. I think that's what we are -- we are done with that part, right?

Q. And just, now, turning to the last topic, which is propane tanks. We asked you to try and tell us, based on science, what hazards are posed by exposing large outdoor propane tanks to fire. And I don't want you to be long because I'm sensitive to the court's needs, but can you just explain briefly what would make a propane tank explode in terms of exposure to fire?

A. There's very little that will actually make a propane tank explode. They are -- in the last -- since the late -- late '60s, early '70s, the National Fire Protection Association has made that a priority. They used to ship liquid -- liquefied propane gas in train cars, and every time they had a derailment, they'd have what was called a BLEVE, which is an acronym that stands for boiling liquid evaporating [sic] vapor explosion --

(Reporter interrupted.)

THE WITNESS: BLEVE, B-L-E-V-E, which is an acronym for boiling liquid expanding vapor explosion. And it's true with any compressed liquid. It doesn't have to be flammable. You can have a steam BLEVE.

The problem with liquefied propane gas is it's also a fuel source, which can actually cause other things to light on fire. And so the National Fire Protection Association decided to address this with some engineering controls, and they installed relief valves and shutoff valves inside of tanks that you can't even get to unless you are engaged in actually the construction of the tank, so that any time there's a release of pressure that happens too quickly, it will activate an automatic shutoff. If the flow of the material outside of the tank is going too fast, it will activate a shutoff mechanism, and if the temperature of the tank gets up to 200 degrees Fahrenheit, there's an automatic shutoff valve that will keep it from escaping.

So I think you have to have your oven at 275 to bake cookies, and this will shut off before it gets to that. It's difficult to get an enormous tank to blow up. In fact, the bigger tanks are safer than the littler tanks. They have spent a lot of money over the last 30 years to implement these safety measures. In fact, it seems fairly recently they moved to the five-gallon capacity tanks to change those out. You might have seen a program in the summer a couple years back where they instituted that particular change-out. So it's difficult to do that.

So they have engineering controls. And instead of actually announcing it to the general public that it's safer

now than it used to be to have propane tanks around, they just fixed it and never said much, so everyone still probably believes that it's dangerous, but it's not true.

And as a result of that, they have gone through and tested their assumptions scientifically. There's a paper by -- that was published -- it was submitted for publication in 2004. It was actually published in 2005, and it's -- it's a systematic study of exposure of a liquefied gas container to an external fire. It's published in the *Journal of Hazardous Materials*, a peer-reviewed scientific journal.

And then they also -- and this actually applies to tanks of 1,000 gallons and larger. And then they did a very systematic test on five-gallon tanks to prove that -- or to test whether that was the -- whether it was safe or not. So it's very difficult to actually get a tank to explode, and as a result of their efforts in the last -- since the '80s, there has not been one firefighter injury resulting from a BLEVE at all.

Q. Dr. Ziegler, does a tank actually explode like a hand grenade explodes?

A. It does not. It tends to weaken at one spot. You have to bring the temperature of the steel up to a point where it begins to soften. And steel doesn't -- doesn't have that characteristic. It tends to bulge or split. If it's going

to fail, the failure mode is by having a little crack.

Q. So what you are saying, a BLEVE would cause the container to crack?

A. And then -- then the vapor that comes out would be expanding, and then that's what explodes, is the vapor, if it gets out.

Q. Okay.

A. And the goal is to keep the vapor inside, and they are fairly successful in that goal.

Q. And if the -- if the pipe that went between the tank and the building, if that pipe was somehow melted through, would that cause the tank to explode?

A. It would not. What would happen, then, is the second type of fail-safe mechanism would kick in, and that would be the mechanism, where the flow rate would increase to a certain level and then it would shut that -- shut that port off.

Q. That's all of the questions we have, Your Honor.

THE COURT: Questions?

MR. PEIFER: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PEIFER:

Q. Is it Dr. Ziegler?

A. Yes, sir.

Q. Dr. Ziegler, have you seen the videos of the various

arsons involved in this case?
A. I have not.
Q. So you haven't seen the one at Jefferson Poplar Farm? The extent of the fire there?
A. I have not.
Q. You haven't seen the one of Romania Chevrolet? The extent fire there?
A. No.
Q. Have you seen an ATF video that was provided in discovery to the defendants that shows an experiment using actual five-gallon buckets placed near a wooden wall?
A. Yes. I think that's the abridged version we just showed you. I have seen it in its entirety.
Q. This is one involving five-gallon buckets made at -- in Tualatin. Have you seen that?
A. I don't know where it was made, but I do remember seeing one that has two five-gallon buckets of fuel and a -- and a one-gallon milk jug, and it's set right next to a plywood wall that's held up with a 2 by 4. Is that the one? Firefighters and diesel fuel.
MR. PEIFER: Your Honor, we debated among ourselves whether to show that because it does very graphically demonstrate how the fire actually spread so quickly, but Mr. Engdall, I think, intends to show that to the court during the Meyerhoff sentencing. Just because of

the economy of time today, we decided not to present it now.

THE COURT: Well, if it helps you ask your questions, you might need to show it, is the thing.

THE WITNESS: I live in Bend, so.

MR. PEIFER: Pardon me?

THE WITNESS: I live in Bend and I'm here now, so go ahead and ask.

BY MR. PEIFER:

Q. You would agree, I think, based on your testimony, that the ELF was working constantly to improve their devices so they worked better and were more effective at starting fires; is that correct?

A. I don't know what their goal was. I know about their researches or their research efforts. I suspect that -- the publications that I saw indicated that they had suggestions on placement, they had suggestions on fuel ratios. But it didn't look to me like it was the result of extensive, ongoing research. I have seen ongoing research, and this looks like a bunch of people trying stuff and --

Q. Right. But the devices evolved over time, didn't they, from when they were first used in 1997 to the ones used in 2001?

A. I think that would be information that was in the discovery, and I didn't see all the details about one device after another one. I saw the -- I saw the manual that was

given to me. But I can't really speak to how they changed. I mean, basically what you have got is a fire and it spreads, and the bigger the fire, goes a little faster. But I was asked to actually address whether something exploded.

Q. And regarding propane tanks, the -- you are aware that the propane tank we are speaking of at Jefferson Poplar Farm was a propane tank, an older tank, in 2001. You understand that?

A. I do. And the thing you need to know is the National Fire Protection Association has gone back and retroactively fixed every -- every propane tank. They started with the larger tanks at -- at factory facilities, and they systematically hit every one. So I would suspect that that one was also upgraded to the other one. The National Fire Protection Association makes recommendations to federal law, so -- and the federal law has encoded their suggestions.

Q. But you weren't able to inspect or view the photographs, or you couldn't tell from the photographs whether the propane tank at Jefferson Poplar Farm had been upgraded in 2001, had you?

A. No one can tell from looking at the tank from the outside because the improvements are internal to the tank.

Q. Now, in your study of propane tank explosions, are you aware of a propane tank explosion that occurred in West Virginia two years ago at a service station in which four

people were killed when the propane tank exploded because it was exposed to fire?

A. No, I didn't.

MR. PEIFER: That's all I have, Your Honor.

MS. WOOD: Nothing further with this witness, Your Honor. May she be excused?

THE COURT: Thank you. You may be excused.

MS. WOOD: Your Honor, the -- Mr. Meyerhoff has filed a request for judicial notice in connection with this hearing, and it's something that the government, as far as I know, has not responded to yet. We basically asked to take judicial notice of the fact that the terrorism enhancement has only been applied in two cases where arson was the offense of highest severity, that information coming from the U.S. Sentencing Guidelines Commission, and that neither of those two cases involved arsons committed by defendants -- excuse me -- known to be affiliated with the ELF or ALF.

We have asked for judicial notice that the government has not sought the terrorism enhancement against any defendants known to be affiliated with ELF or ALF in any previous arson prosecutions that have taken place nationwide.

And I do think they addressed number three, which was a request that the court notice that the government is

not seeking the terrorism enhancement in the cases against Jennifer Kolar and Lacey Phillabaum that are pending in the Western District of the Washington. The government apparently disputes that, so -- but I don't know their position on points 1 and 2 and if they oppose the court taking judicial notice on those.

MR. PEIFER: Your Honor, I don't think that's a matter the court can take judicial notice of because it's incomplete information, and we don't know the full universe of cases out there. We have given the court, as best we can, reported cases, cases that we are aware of. This is the first time a case of this magnitude has been prosecuted against an entire cell of ELF and ALF. So it's like comparing apples and oranges.

THE COURT: Are you intending on filing anything further? Do you intend to file anything further?

MR. PEIFER: Not on that issue, Your Honor.

THE COURT: All right. Fine. We'll take it under advisement.

Proceed.

MS. WOOD: Your Honor, we also ask that the court take judicial notice that none of Mr. Meyerhoff's crimes of convictions involved a substantial risk of serious bodily injury or death, and also that he did not knowingly create a substantial risk of serious bodily injury or death, and ask

that if the government does dispute that, that they advise that, and that they present facts and evidence, not just opinions, to support those claims at the sentencing hearing.

MR. ENGDALL: Your Honor, we will provide evidence at the time of sentencing on that specific issue.

MS. WOOD: Your Honor, I'm sure the court's read my lengthy argument in opposition to the terrorism enhancement, and I don't intend to reiterate that today in court.

I do want to make just two points that aren't in my memorandum. One is that I urge the court to make the efforts to try and sort through the facts from the rhetoric about the dangerousness of the fires in this case. We presented some statistical information on it today. It looks like we may be dealing more with the individual facts of the case of these incidents in Mr. Meyerhoff's sentencing hearing. I just -- I think that what -- what we all run up against is a preconception that fires and -- that fires are dangerous because arsons, after all -- arsons aren't dangerous. They don't cause injury or death. It's the fire. And the injury or the death has happened before the motive or the cause of arson is determined.

And so it's quite valid to look at what the statistics are nationwide on injuries and deaths in fires of nonstructures, for example, as are cited in the statistical

study we presented. And keep in mind that those statistics from the National Fire Protection Association concern all nonhome structure fires; that is, occupied as well as unoccupied structures. And we would all assume that if firefighters think there's somebody in a burning building, they are much more likely to rush in at their peril than they are if they believe that it's an unoccupied building.

And I ask the court to consider the recent fire at the Gheen Irrigation Company here in Eugene that happened back in April. We have got just a brief showing of that. This fire, according to the newspaper reports, was the largest fire that's been in this area in about the last 25 or 30 years. It was, according to the newspaper, in very close proximity to the Ferry Street Bridge neighborhood. It was wedged in between residential buildings to the east and north. And additionally, the facility housed about 30 chemicals that were on the hazardous chemical list. And there were no evacuation of people living next to that fire. There were no injuries in that fire. There were no deaths in that fire, either by emergency responders or by anyone in the vicinity.

So I just -- I ask the court to recognize that we can have big fires in the middle of a residential area and it not result in injury or death. And the statistics from the National Fire Protection Association would show that, in

fact, even when you have occupied structures that are nonresidential that it's fairly low.

So I am -- I am just certain that if we had an article that came out a day or two after this where the ELF had claimed responsibility for this fire, we would have been reading headlines about how ELF action endangers North Eugene community; whereas, the reaction reported in the newspaper to people observing the fire was pretty much like curiosity, wow, have you seen anything this big before. So it's just to try and look at the facts and not get swept up in the rhetoric about how dangerous this group was or how dangerous these fires were.

Your Honor, the next point or last point I'd like to make comes back in response to the government's request that the court apply this enhancement basically as it reads on its face and that it apply it uniformly, and that we have truth in sentencing. And that caused me to go back and look at a case that was sentenced by Judge Hogan recently in this district, and it was the case of *United States v. Jacob Albert Laskey* in Case No. CR 05-60053. You will see that the indictment in that case charged that he, among others, were self-avowed white supremacists, and that they sought to commit acts of violence and destruction against Jews, African-Americans, and members of other ethnic and racial groups.

It's on the second page. And if you turn to Page 6 of that indictment, you will see Count 9. And you will see that it charges there that Mr. Laskey solicited another person to violate Title 18 United States Code § 2332a(a)(3). That is a crime listed in the 2332b(g)(5) list of terrorism offenses. It's been listed there since the beginning of that statute being enacted in 1996.

And he's charged there under the general solicitation statute, 18 U.S. Code § 373, which we submit is analogous to the general conspiracy statute in § 371. And so using the government's approach to applying the terrorism enhancement, we find that Mr. Laskey, by his own admission, solicited another individual to commit a federal crime of terrorism and therefore obviously intended to promote a federal crime of terrorism. That involved calling in a bomb threat to the courthouse.

Then we know from further filings in that case, Attachment B to the government's supplemental sentencing memorandum, the government obtained a -- an article that Mr. Laskey had mailed off to *Resistance Magazine* while he was at Sheridan pending sentencing, and the article itself is pretty hard to read. So that's the first page of it, and I have just excerpted a few sentences out of that. It says, "Resisters Revolutionary Manifesto - Jake Laskey. I am a political prisoner. I am a casualty of the endless Race War

that proceeds today."

He goes on, "Never will we have peace in America until the foreign, despicable, and oppressive System's presence is removed."

It's clear, if you read the entire submission by Mr. Laskey, that "systems" is his word for the "government."

He goes on, on that same page, to talk about a method of helping accomplish the -- them winning the race war. He urges execution cells to break into homes at early dawn and kill targets in front of wives and children, political officials coming or going to work. The key is television because funerals of targeted officials are covered with great detail.

(Reporter interrupted.)

MS. WOOD: Right. Because funerals of the targeted officials will be covered in detail -- great detail, and create a media frenzy.

And then he goes on, on the second page, to -- to talk about how cells must adopt a policy of shoot and scoot and target public officials and politicians.

He says that assassinating public figures or bombing campaigns in the system, again, government office facilities, like the 1990s Oklahoma City bombing, will get us more time on television and commentary than mass killings of civilians, just like the murder of John or Jane Doe.

So we -- we know that his motive in throwing rocks through the Temple Beth Israel window while there was a service in -- going on and people were present was part of his plan to overthrow the government. We have got proof of his motivation. We have got proof of a federal crime of terrorism, and the terrorism enhancement was never sought in this case.

And so, again, the court's heard arguments about the unequal application of this enhancement to the defendants in this case. And this is the closest case I can find in this district that it should have been applied to and it wasn't, if you take the government's reading of the enhancement.

The final thought I'd like to leave the court with is that the decisions the court makes in interpreting this statute have ramifications beyond this case. And when the defense urges the court to -- to find that when you look at the act as a whole, congress intended this third element of substantial risk of serious bodily injury or death when the crime involved was simply one of property damage, we are not proposing that simply because these are arson crimes. We are proposing that based on the whole act, and that's where that language comes from. It happens to dovetail in with the guidelines with similar language under the arson guidelines.

But the court -- the court's decision about whether this act applies literally on its face to simply property crimes with nothing else will have ramifications for the next defendant, for the next Mr. Laskey who comes before the court, and perhaps simply because he threw rocks through a window with a wrongful, hateful motive, perhaps he wasn't somebody that congress intended to have the terrorism enhancement apply to.

That's all I have, Your Honor.

MR. STORKEL: Your Honor, I'm going to stay here because I have a very short legal argument. I will be relying on my memo that I filed and the joinder in the arguments of the other attorneys in this case.

In my argument, this is a constitutional case, and it's in the right forum. It's in the United States District Court. The acts of Nathan Block predate the legislation that was enacted on October 26th, 2000 --

(Reporter interrupted.)

MR. STORKEL: I will slow down. Sorry.

The acts of Nathan Block predate the legislation that was enacted on October 26th, 2001. Any application of the October 26th, 2001, legislation in this case constitutes an ex post facto application of the law, in violation of Article I, Section 10, Clause 1 of the United States Constitution and the due process clause of the Fifth

Amendment of the United States Constitution.

As a citizen, Nathan Block is entitled to the fair application of the guidelines, consistent with the principles and protection of the United States Constitution.

The defendant and government agree that the guidelines calculations should be derived from the United States Sentencing Commission Guidelines Manual with an effective date of November 1st, 2000.

Statutory changes after November 1st of 2000 cannot be constitutionally applied to this case, and so therefore, with that, along with the arguments in our memoranda, we are asking that the court not apply the terrorism enhancement in this case.

Thank you.

THE COURT: Mr. Kolego.

MR. KOLEGO: Your Honor, on behalf of Ms. Savoie, we join in the arguments of the other counsel and reserve the right to produce evidence at the sentencing hearing.

That's really all I have right now.

THE COURT: Thank you.

Mr. Foreman.

MS. MCCREA: I'm taking Mr. Foreman's place.

May it please the court, counsel for the prosecution, members of the defense, Your Honor, Kendall Tankersley's unlawful activities were brief in time and

limited in scope, and I intend my comments to be the same.

Three points.

On behalf of Ms. Tankersley, we adopt the arguments ably made by the other counsel and, based on the arguments made before the court today, ask the court to not apply the terrorism enhancement in this case.

Two, if the court determines that the terrorism enhancement does apply generally, we submit it is not applicable to Ms. Tankersley. One business was targeted. That was U.S. Forest Industries, a private property. We agree that there was an effect on interstate commerce, but our position is that Ms. Tankersley's statements in connection with her plea do not support a claim of intent to affect the government.

And three, even if the terrorism enhancement is applicable, it should not be applied to Ms. Tankersley on a factual basis. Clearly, the court has to evaluate that at sentencing, at her sentencing with regard to her, and not here. And that will be a question of the evidence to be presented both by the government and the defense as to whether it can be established that there was an intent to calculate -- calculated to influence under the terrorism definition.

THE COURT: Mr. Feiner.

MR. FEINER: Thank you, Your Honor.

Everything's the same as it was before.

THE CLERK: All I can suggest is that you shut it off and start over again. We are picking up something from you, but --

MR. ROBINSON: Your Honor, could I take this moment, while we are working on the technology, on behalf of Mr. McGowan just to indicate that, given the court's remarks this morning about what we should be prepared for at the individual sentencing hearings, we would like to make a request that the government provide *Jencks* material for any witnesses that are going to be testifying so we can be prepared to cross-examine them on the morning of the hearing. I don't know that the government is going to provide -- call witnesses in our particular case. It may be that they are just going to submit evidence, but if there are going to be witnesses, we do want to be prepared to cross-examine them.

MR. ENGDALL: Your Honor, we will provide the necessary information to counsel.

THE COURT: We are going to take just a brief recess. I think that will help the performance anxiety of getting the machinery to work. For some strange reason, it will make it work. I don't know why. But if we are all not watching, it seems to work, and Ms. Engdall is going to get our technician who is on site to assist. So we will take

that brief recess.

I suggest counsel have an opportunity to talk, because I'm going to tell you, if I walk into court and there are, all of a sudden, surprises with witnesses and things that aren't expected, it will disrupt everyone's schedule, because I'm not going to be proceeding to hearing if people aren't on notice and prepared, period.

So everybody needs to at least have that conversation today, because you are all here, and if there are any issues or concerns that will disrupt the schedule, I want to know about it because we have held on as hard as we can to these dates and are trying to stay within the boundaries of meeting everybody's expectations, and the first one who goes sideways with it will blow the dates for every single person, including the staff that's been ready to go, and cases that are bumped in accordance with attempting to keep your schedule together.

So why don't you use the ten minutes or so wisely, and then it looks like we'll finish earlier than the end of the day, and use the end of the day to work through any issues, because I will be available to resolve any ministerial matters that need to just have clarification.

All right? We'll take a recess.

THE CLERK: Court is in recess.

(Recess.)

MR. FEINER: Good afternoon, Your Honor. I believe we have all the glitches resolved.

My name is Dan Feiner. I represent Darren Thurston.

Our position on the terrorism enhancement is considerably different than anything that you have heard up to this point. We are narrowing the focus very much. Our approach is that the enhancement itself, given Mr. Thurston's involvement in this offense, does not apply.

What I have here today are a number of visual images that will enhance the position that I took in Section 2 of the discussion in the memorandum that I filed.

Where I'd like to begin is just first talking about the crimes that Mr. Thurston was convicted of. He was convicted of one count of 18 U.S.C. 844(f)(1). In the memo, I referred to that as the California arson. That's the Litchfield arson that occurred on October 15th, 2001.

In Eugene, he pled guilty to a conspiracy count, and that really forms the basis of my presentation here today. What I would like to first show you is the -- we have all seen this, but this is the information in Mr. Thurston's Eugene case, and I just want to point out here that the crime was alleged to have begun in October 1996 and continued through October 2001. And that language becomes very important, as I identified in the memo

and as I will speak to in a moment, because on October 26th, 2001, the Patriot Act amendments were passed. Unlike some of the defendants, who are arguing against application of the Patriot Act in their case, in fact, it's our position that the Patriot Act establishes that the terrorism enhancement does not apply to Mr. Thurston.

The next image is the last page of the information that he pled guilty to. And I am presenting that to reflect that, in fact, on October 30th, 2001, so after the October 26th date, during the time that this conspiracy was running, before its termination on October 31st, according to the charge, there was an act taken, a communique was distributed attributing the fire to the ELF.

And the government's sentencing memorandum, Page 48, reflects that, in fact, it was Mr. Thurston who posted that communique. So we not only have an act that occurs in relation to the conspiracy after the October 26th enactment of the Patriot Act, we have an act taken specifically by Mr. Thurston himself.

In the prosecution's opening statement or opening presentation, there was a reference to the plea agreement that we signed here. There was a reference to having honesty, I would call it accuracy, in guidelines calculations. Where I think that is important is that there are references to the fact that Mr. Thurston and that the

other defendants agreed to use the guidelines book as it existed on October -- November 1st, 2000.

This is a copy of the plea agreement where it references it, and it doesn't say exactly that. What it says is that, "Defendant and government agree that the guidelines calculations should be derived from the United States Sentencing Commission Guidelines Manual with an effective date of November 1st, 2000." It doesn't say "as it existed on November 1st, 2000." We are dealing with, and we agreed to use, a particular guidelines manual.

Now, the government is taking the position that because 3A1.4 references 18 U.S.C. 22 -- 2332b(g)(5), that in one way or another, that statute is incorporated into the sentencing guidelines, and that we have agreed to use the statute as it existed on November 1st, 2001.

As I provided in the memorandum, we did not do that. It is not in the agreement. However, for the purposes of this argument, I will accept that fact, that, in fact, 2332(b) is incorporated by the language in 3A1.4. So the guidelines refer to the statute, and they pull the statute into the guidelines, and when we agreed to the book, we agreed to the statute. Because the fact is, under the law that applies to the sentencing guidelines, the amended statute becomes the one that is appropriate for us to use.

What we have here is just a really basic time line

that lays out the fact that on October 15th, 2001, the Litchfield arson occurred. On October 26th, 2001, the Patriot Act amendments went into play. On October 30th, Mr. Thurston posted his communique. And on October 31st, for the purposes of this information, the conspiracy terminated.

So what we have got is a conspiracy that bridges the amendment to 2332b on October 26th. The reason that's important, of course, is that the amendment on October 26th took out of 2332b(g)(5) any reference to 844(f)(1), which is the crime that Mr. Thurston was convicted of in California. It is the primary crime that the conspiracy that he pled guilty to is alleged to have promoted, and it also -- the conspiracy -- the Patriot Act amendment removed 18 U.S.C. 1361, which is the destruction of government property offense and, until the government's memorandum, we were not aware was involved in this case. Each of those crimes, each of the two crimes that the government says Mr. Thurston's involvement in the conspiracy promoted was removed on October 26th.

So when we go from that point, what we next -- what I next looked at was the crime of conspiracy itself. The crime of conspiracy is a continuing offense. It is generally held to have occurred at the time when its objective is thwarted. *United States v. Castro*, which is

972 F.2d 1107, a Ninth Circuit case, indicates that conspiracy is a continuing offense. It is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy.

What happened in *Castro* is there were amendments to the sentencing guidelines that occurred in the middle of the conspiracy that Mr. Castro was involved in. And the court indicated that it had never had that issue, never had to deal with that issue before. That it was an issue of first impression. However, they went back and looked at conspiracies that extended past the starting date of the sentencing guidelines and had begun before there were guidelines and ended when there were guidelines. They looked at statutes that had been amended during the course of a conspiracy running.

And what the court said, and it's the last part of the statement right there, "Here, the object of the conspiracy was not defeated until the final seizure of cocaine and the arrest of the coconspirators. That occurred after the effective date of the amended guidelines. Therefore, the amended guidelines apply to this offense."

So the Ninth Circuit has held that when a conspiracy charge bridges an amendment to the guidelines or an amendment to a statute, in this case we are considering

them both the same for the argument, you apply the guidelines or the statute that were in effect at the time the conspiracy terminated.

So we now have the situation where, at least for the conspiracy charge, I suggest to you that an honest application of the United States Sentencing Guidelines would provide that we would use the amended version and we would use the amended version of 2332b(g)(5), and the two offenses that Mr. Thurston is alleged to having promoted were not considered federal terrorism offenses at that time, and therefore, they would not form the basis of the terrorism enhancement.

We still have one conviction, and that was the conviction on the time line for October 15th, the Litchfield arson, hanging out there. Obviously, if that was the date we were looking at, that precedes the October 26th amendment, and that would become an issue. The guidelines have taken care of that for us, however, with 1B1.11. "If the defendant is convicted of two offenses, the first committed before and the second after the revised edition of the guidelines manual became effective, the revised edition of the guidelines manual is to be applied to both offenses."

So basically we have got the conspiracy happening after the amendments. We have the 844(f)(1) occurring before the amendments. The conspiracy reaches back, it

grabs the 844, and it pulls it up to after the amendments.

At the time the conspiracy terminated on October 31st, 2001, neither 844(f)(1) or 1361 were listed in 2332b(g)(5) as federal crimes of terrorism. Therefore, when 3A1.4 in the 2000 book, the November 1st, 2000, initiated book, there's been no change in the guidelines book, and we are in no way suggesting we are using a different book other than that 2000 book, when you pick up that book at the conclusion of Mr. Thurston's crime and you look back, you look -- 3A1.4 refers you to the statute, 2332b, and those crimes are not there. Therefore, he cannot receive the terrorism enhancement because the crimes that he committed and promoted are not on the predicate list.

Thank you. I have nothing more.

THE COURT: Mr. Blackman. You are batting cleanup, it would appear.

MR. BLACKMAN: May it please the court, counsel, Marc Blackman on behalf of Jonathan Paul.

Let me say that the court made a comment earlier today that was something that occurred to me about two weeks before our memos were originally due, which is don't -- doesn't the court have to make an individualized assessment of each offense and each offender in determining how to -- whether or not this terrorism enhancement applies, and what can this hearing, which is sort of like a global address of

that issue, accomplish.

And as I was researching and drafting the memorandum on behalf of Mr. Paul, I found it very difficult to discuss the law in the abstract and not bring in facts, and, of course, the court hasn't heard any facts yet. You have heard assertions by the government. We saw those in the government's memo, and on behalf of Mr. Paul, I felt a need to immediately respond. The court hasn't ruled on my motion to file that supplemental memo yet, but it really is impossible, in this setting and with this situation, to make any definitive call as to any defendants being subjected to the terrorism enhancement because it is, contrary to what I -- I thought I heard Mr. Peifer say today in his reference to *Pinkerton* liability, that somehow a guideline application could be based on a *Pinkerton* substantive responsibility for a conspiracy theory. It is certainly my understanding that the guidelines and the application of the guidelines, even in the conspiracy setting, require the court to make a particular and individualized assessment as to the role of each defendant in the offense, the nature of the offense, and the defendant's role in that offense.

And so I don't know if Mr. Peifer misspoke when he was making that reference to *Pinkerton*, but it highlighted for me what we could maybe accomplish as a result of this hearing. And so over the course of the day, I have actually

just made a little list of things that I think we might ask the court to rule on in anticipation of the individualized sentencings that are coming.

The first thing is, are the offenses on which the government is relying, and specifically the offenses that the defendants have pled guilty to, do they qualify as predicate offenses for the application of the terrorism enhancement. This sort of is what Mr. Feiner was talking about specifically with respect to Mr. Thurston, but I think it can be something the court can look at and give us some guidance on, on a defendant-by-defendant, charge-by-charge basis.

For example, as Mr. Feiner points out, an offense under 844(f)(1) today is not a predicate offense. Technically, that changed, as he's just explained, at the tail end of the time covered by this conspiracy.

Clearly, I think the court can say that is an expression of what the congressional intent was all along, and that's why all this talk about what is terrorism, what is -- what does that concept capture is important, because it's important in trying to find out what offenses the congress intended to include as the predicate offenses for the application of the federal crime of terrorism guideline.

So I think the court could tell us, for example, that an offense that meets the elements only of an 844(f)(1)

offense, which is property damage only, simply does not constitute a federal crime of terrorism. Conversely, the court could say, you know what? They didn't segregate out those (f)(1), (2), (3) sections until a week later, and so too bad, Mr. Thurston, you are stuck. No. You can tell by my presentation that I think that would not be an accurate reflection of the intent that is clear now as to whether or not 844(f)(1) is a federal crime of terrorism. But I think the court could give us a clear guidance on that question.

For Mr. Paul's situation, we fall right in line behind that because, as I point out in our memo, 844(i), which relates only to private property, is analogous to 844(f) except -- because somewhere in the congressional drafting office some people were drafting sections and liked semicolons and other people liked sub paren 1, sub paren 2, sub paren 3, so you have an 844(i) statute that is absolutely identical to the 844(f) statute except (f) applies to government property, (i) applies to private property. But the first clause of 844(i) is identical to (f)(1).

And so I think the court could say drafting is not the basis on which we determine if an offense is a federal crime of terrorism. And if an 844(f)(1) offense, property damage only of government property, is not a predicate terrorism offense, then certainly the same violation of

844(i), property damage only, private property, can't be a federal crime of terrorism, even though 844(i), in general, is referred to in the guideline reference in 2332(g)(b) [sic] whatever.

In other words, I think you can tell us, and I would urge the court to tell us, that the clear congressional intent, when you look at the 844(f)(1) subsection and the analogous language in 844(i), means that if it's property damage only, private property does not qualify as a terrorism predicate offense.

I think the second thing you can tell us is whether or not on the motivational element, or prong, whether you agree with the government that someone else's motivation can be sufficient to hold another defendant responsible for the essential motivation, or if it does require the individualized and particularized assessment that I believe runs throughout the guidelines.

And I, again, would hope the court would say that this is an individualized assessment that looks at each defendant's motivation and the real evidence of what that motivation is, which is, of course, a very fact-specific issue.

Along with that, I think the court could tell us whether or not, in making that assessment, it would be a violation of 1B1.8 to use the statements our clients were

required to make as part of their plea agreements with the government or whether that is a violation of the guidelines.

That portion of the guidelines is very mysterious to normal people like my client who read it and say, well, the guideline says the court is to be told, right, when a defendant makes a statement, as my client did, about his own activity, the guidelines say that information is to go to the court, but the court may not consider it in determining the application of the guidelines.

And my client says, well, how can a judge make -- do those mental gymnastics. And I say, well, that's what judges do every day. But I think you could tell us whether or not 1B1.8 precludes the government and the court from relying on the debriefs made as part of the plea agreements in determining what the motive may have been with respect to a specific incident.

I also think that you can tell us whether or not you agree with the defense position that if you find that an offense is not a federal crime of terrorism, that the Application Note 4 to 3A1.4, which says that if it's -- if it's only directed against the civilian population or private business, the court may consider that as a basis for an upward departure, whether that application note, which was adopted after the fact in this case, can be applied retroactively.

Of course, we believe it cannot be, and we believe that the post-offense conduct adoption of that application note not only confirms that an offense like Cavel West cannot constitute a federal crime of terrorism, but also that it cannot be a basis for an upward departure, because applying an upward departure adopted after the conduct and after the guideline book that we have all agreed controls simply can't be under the ex post facto clause applied retroactively. And I think you can tell us that.

Then I think you can tell us whether or not you believe that if you find that the terrorism enhancement applies, you retain the authority to conclude that categorizing someone as a Category VI criminal history overrepresents their criminal history and warrants a reduction in the standard way that the court does in every case where the issue of whether the criminal history does or doesn't accurately reflect the person's -- the purposes of that categorization.

I think that if you could give us some guidance on that, it would help all of the parties prepare for their sentences.

With respect to the conspiracy count, I think you can tell us whether or not you believe that a conspiracy can qualify or not as a federal crime of terrorism, and, if so, what the criteria for that would be. In our view, of

course, a conspiracy cannot be a qualifying offense if the offense, the substantive offense that it was allegedly promoting is itself not a federal crime of terrorism.

So in Mr. Paul's case, for example, the arson of a private business under 844(i), as I have explained, we do not believe can qualify as a federal crime of terrorism. A conspiracy to commit that offense, therefore, we believe, cannot be found to have promoted a federal crime of terrorism.

Now, you may take a different view, but I think if you could let us know in advance, that might be helpful. And I think, again, it would be helpful in that regard to be clear or let the parties know if in fact my client -- a particular defendant's exposure to the terrorism enhancement is an individualized assessment of that client's actions and motives or if vicarious liability under *Pinkerton* could possibly be a way for the government to get there. That, I think, would be new law for sure.

Then I think the last thing that you probably could help us with is how do we handle the logistics of the sentencings, given that we have sequential sentencings but some incidents in common. I think it was Mr. Weinerman, maybe, made reference to the fact that by the time he gets -- we'll follow up on the baseball analogy -- gets into the batter's box, the court may have already made a ruling

on at least one of the incidents that his client is accused of. I'm in the same situation on behalf of Mr. Paul, because Cavel West, I think, will be involved in the Tubbs sentencing, which precedes ours.

I believe it is a very difficult Sixth Amendment issue for the court, in an evidentiary hearing in which a party is not participating, to make a ruling that is binding on that party. Conversely, even if it's not technically binding, it's very difficult for me to imagine that you might rule in the Tubbs sentencing that the Cavel West incident somehow qualified as a predicate offense and then say, oh, you know, at the Paul sentencing, I didn't know that at the time I sentenced Tubbs, so I was -- for Mr. Paul's purposes, Cavel West is not a federal qualifying offense.

And I don't know logistically, but I think if you could give us some guidance on, you know, should Mr. Weinerman show up? Should he be there and say, I'm here, Your Honor. I have some things I'd like to present in connection with this sentencing? Should I show up at the Tubbs sentencing and participate to make sure the court has all the information I think the court needs in assessing whether that is an offense that qualifies just on the predicate level?

And I think all of those questions really would

help us refine the issues that we need to clearly present to you at the time of sentencing. And they can do so in a way that I think will give everybody a fair shot at trying to establish the factual basis that is relevant to you in making that decision.

The Cavel West offense is obviously the only one I care about. It is the only one that I really think I know a lot about, and it's one that I think I can demonstrate, without really even any reservations on the part of Mr. Peifer, was motivated, for someone like Jonathan Paul, to be designed for one purpose only. To put an end to a horrendous operation. I have a video, I think I made reference to it in a footnote, of a slaughterhouse operation. I was going to show it today to respond to some of the allegations of the government's memorandum. I don't believe that's an appropriate thing to do today. I do intend to present it at the time of his individualized sentencing. But I might want to present it at the time of the Tubbs sentencing, because I think anyone who sees it would -- the last thing they'd ever ask themselves were -- would be where did these horses come from. That's not a question you ask when you see this.

When you read about Cavel West, as I have quoted in our memorandum, and the way it fouled the water in Redmond and stunk up the air and overwhelmed the water

treatment system and inhumanely disposed of healthy animals, I don't think the question would occur to anyone, certainly not Jonathan Paul, that where these horses came from meant anything.

And that is the key in making individualized decisions about individual defendants. And I think if the court tells us that's right, we can focus these presentations and maybe have this one be the longest one you have to endure of this series you are about to engage in.

Other than that, I want to thank the court for your great patience today. I think all of the parties see this as a very significant issue on a whole bunch of levels. I don't necessarily share some of the views of some of the folks here. I think this court has a function in our system. I'm not sure that it can be to cure the ills of the world. I don't think it was a court that remedied the Japanese internment, and I don't think it is fair of us to ask you to do that.

But I think it is fair of us to ask you to give us clear guidance, to confirm that what this is going to all turn out to be about is what did an individual defendant do, why did he or she do it, does that offense qualify, is that what the congress had in mind, is that what they meant to capture, is there evidence that that's why it was done, or, given the allegations -- and, again, Mr. Peifer read the

allegations in the conspiracy count as if they were "and." They are not. They are "or." This conspiracy is some of the defendants were motivated for this reason, some for that reason, some did this, some did that, or, or, or.

The government generally could not hold defendant A responsible for something that he or she was not a party to. And I think that when we get down to it at these individual sentencings, that's what it's going to come down to. Is it group guilt or is it individual guilt. I think if the court agrees with the defendants that this is an individual assessment, the court will find that these were not, certainly Cavel West, was not a qualifying predicate offense, and that Mr. Paul did not act with the requisite motivation. This was not about the government.

Thank you.

THE COURT: Do either of you wish to respond?

MR. PEIFER: Your Honor, one thing I want to point out right away is that the reference to § 1B1.8 of the guidelines regarding the use of certain information doesn't apply to Mr. Paul, doesn't apply to three other defendants, because it only applies where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others. And the reason they made that plea agreement, Mr. Paul and Ms. Zacher and Mr. Block and the remaining defendant -- I forgot his

name -- and Mr. McGowan, of course, the reason they made that agreement was so they wouldn't provide information regarding others. And so it's just not applicable for them to invoke that provision because it doesn't apply to them by its very terms, on its very face. They never gave us any information regarding other people. And every time we asked for information regarding other people, they said no, it's not part of the plea agreement. So they can't benefit from 1B1.8.

MR. BLACKMAN: Could I just respond to that, and then I will go sit down?

The guideline says, cannot use information when it's in the context of providing information about others. We were required to provide information about others. Not names. Not roles. But the fact that others were involved, and I think it said, I will read it to you, defendant agrees to participate in disclosure sessions with the government which shall be conducted pursuant to FRCP 11(f), FRE 410, and U.S.S.G. § 1B1.8, and, as described below, provided that defendant shall not be required to reveal information that inculpates others, reveals their identities or would be the functional equivalent of revealing their identities.

And then it goes on to say that we must disclose the details of the defendant's own individual conduct and whether defendant acted alone or in concert with others.

And we did that, and that is information about others. The guideline 1B1.8 uses the word "others." It doesn't say "identities."

MR. PEIFER: Your Honor, the argument about whether the offenses qualify as predicates in this case is answered by reference to the plea agreement and reference to the statute as it existed at the time of the offenses. 844(f) was not distinguished in terms of whether it was subsection (1) or (2) at that time under the definition of federal crime of terrorism.

And that was -- it was made very clear for all ten defendants that they were agreeing to the guidelines in effect at that time, and the guidelines in effect at that time referred specifically to a provision in Title 18 that was changed later. And so the agreement supersedes any -- any conflict as far as that goes.

As far as implying motivation, I didn't want the court to think that I was arguing that just because somebody had motivation A, that another person would necessarily have motivation A. That's based upon the totality of the circumstances, what the second person knew. And our position is that, yes, Mr. Tubbs had that motivation. He's admitted that motivation, or at least that knowledge, in his sentencing memorandum to the court. And that was based upon something that was commonly known virtually throughout the

country. Anyone reading newspapers about horses would know that this was going on, that Cavel West and that BLM were linked together. And that's a factual question. The court will have to decide that at sentencing.

As far as using Application Note 4 for a departure as an alternative ground, that, of course, would apply if the court found that in each case for each defendant no crime sufficed as a federal crime of terrorism. And if it does that, if the court does that, then we are asking you to consider Application Note 4, not because Application Note 4 created a new ground for departure, but because, as in many cases of the commentary, and we cite cases to the court on how the commentary is interpreted, the commentary doesn't create new grounds for departures, in this case, not for an enhancement based upon the regular offense level increase, but a departure, it doesn't create the grounds. In many cases, it recognizes grounds that already preexisted. And there was a general ground available in cases prior to that time for a departure based on the more generic sense of terrorism as described in that application note.

I think we have answered, at least I did in the opening argument, about whether § 371 conspiracies can qualify if the predicate is 844(i), because that was what was listed as a predicate offense at the time of -- the statute was enacted as applicable in this case.

As far as how the court wants to proceed regarding justifying, you know, sequential sentencings, that's something we'll have to deal with with each sentencing. I know that Mr. Engdall will be presenting the evidence against Mr. Meyerhoff, and that will include the actual arsons that he was involved in.

Now, one of the defense attorneys, I think it was Mr. Blackman, I'm getting them confused.

MR. BLACKMAN: We are all the same.

MR. PEIFER: Right.

Made an interesting statement, Your Honor, and the statement basically was, of course, everybody has to be judged differently based upon their motivation, based upon the facts of their individual cases.

And there's no doubt that conventionally the court's going to be presented with the situation in which the court may very well want to deny it -- I shouldn't say no doubt, but the defense will ask this -- deny it for somebody who got it -- the sentencing enhancement for another defendant. And that's just the way it works. We judge people individually.

But there's no doubt that the court can, under the *Booker* decision and under § 353(a) [sic], can make your own determination about where to sentence, you know, within the guideline range, especially after we make the recommended

sentencing reduction for acceptance -- for substantial assistance, because that -- as they point out, that will bring the sentencing range back down into the range that was anticipated under the plea agreement.

Unless you have any other questions, that's all I can say at this time.

THE COURT: The only thing I want to say is I very much appreciate all the briefing and the work everyone has done, and I don't take these issues lightly. But I do have to say that it's an interesting issue, just generally, and I go to Mr. Weinerman's argument, and that is that the courts make decisions when they are asked to make a decision or required to make a decision. So the court is faced with the obligation of completing the guidelines calculation, and the government has made the request for an application of a particular guidelines factor. And I will make my decision individually and as it affects collectively based on whatever I can glean from this argument helps give you some guidance for your individualized sentencings, which is exactly what we will do, is individualized sentencings.

But on the one hand, I will make that legal determination, it doesn't do anything other than to apply the law that the court has to read and apply. It doesn't do anything more than that. And then I will go through the exercise of the sentencing for each individual that, in many

ways, Mr. Weinerman has already indicated goes up and then goes down before I even have an opportunity to take a look at what I might do in a particular case, because those were the negotiations that you all entered into before this case came before me on individualized changes of plea.

So in other words, today I will give a legal analysis and give the best guidance I can give towards your individualized sentencings, but they are individualized.

Now, the issue that Mr. Blackman addresses, and it's come up any number of times, is what is the judicial economy that's accomplished by the individualized dates, or, as Ms. Bloomer and I have discussed, maybe you all need to sit here for ten straight days and we just do it as one huge sentencing. I think it argues that individualized sentencing should be just that.

And we will take a look at these cases and we will give you the guidance we can give you. But I understand that may be difficult for some people, and they may need to sit in on other sentencings. But I will just leave that up to you to make your own professional determinations. But I understand the issues that I have to give guidance on. I will give you the best guidance I can give you.

But by and large, your sentencings will be just that, your own individualized sentencings. And as clearly as stated by Mr. Weinerman, so much of that information is

available in each plea agreement, and those calculations have in fact been done, and I understand what I am required to do today because when courts are asked to make a decision and are required to, I will make that decision. That doesn't mean necessarily all that the defense would like to implore that it might mean or might label somebody. It's simply the decision this court has to make based on the requirements of a statutory calculation under the guidelines. That's all it is.

So for today's purposes, thank you very much for your arguments and your -- the way you broke it all up. I think you covered everything you needed to cover and augmented the briefing that you accomplished. I appreciate your talking about it.

If there are any issues that are going to have us running longer than we expect the time lines to take up, I would like to know that ahead of time, because we are pretty tightly scheduled.

If there are any disagreements about how you are going to proceed, I'd rather know sooner rather than later. I'm not going to tell you whether I'm going to have this to you before late Monday, maybe even Tuesday. We are working as hard as we can to get our rough work done, but I'm just not going to promise when you will have an opinion or when you will have some guidance in writing or whether you will

have enough or as much as you would like to have, because I may leave open any number of questions to resolve through individualized sentencings.

But again, thank you very much for your time, and I appreciate all the work you did. Thanks.

THE CLERK: Court is in recess.

(The proceedings were concluded this 15th day of May, 2007.)

I hereby certify that the foregoing is a true and correct transcript of the oral proceedings had in the above-entitled matter, to the best of my skill and ability, dated this 10th day of August, 2007.

Kristi L. Anderson, Certified Realtime Reporter